Petition

81-907

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No.

IN THE
Supreme Court of the United States
OCTOBER TERM 1981

SAM C. MARTINO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, authorizes a finding of membership in or association with an illicit enterprise, where the defendant's only connection with the enterprise or its activities consists of isolated or sporadic acts, without continuity of association or participation.

Whether a person engages in a pattern of racketeering activity by participation in a single isolated act or transaction, if it is possible to institute two or more criminal charges against him resulting from that act or transaction.

Whether the due process clause of the Fifth Amendment to the United States Constitution and Rules 8(b) and 14, Fed.R.Crim.P., authorize joint trial of multiple defendants, each of whose connection with a RICO enterprise was limited to one or a few transactions, unrelated in time, place and circumstances to those of other defendants, and each occupying a limited and non-continuous period of enterprise activity distinct from those in which other defendants were involved.

PARTIES BELOW

United States of America
John Alan Holt (deceased)
Rosario Palermo
William H. Brown
John D. Fisher
Robert D. Young
Joseph Macaluso
Frank Scionti
John Nicholas Lostracco (deceased)
Sam C. Martino
Paul Guarino
Jimmy Farina
Berton B. Chase – (note interested in this petition)
Rolando Gonzalez Rodriguez
Joseph D. Lazzara
Joseph C. Rusello
Amalia Morgado

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Sam C. Martino petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. 1) is reported at 648 F.2d 367.

JURISDICTION

The decision of the Court of Appeals was announced on June 19, 1981. No judgment has been entered based thereon, since the Court of Appeals has stayed its mandate pending the filing and disposition of this petition. A petition for rehearing and suggestion for rehearing *en banc* were timely filed on July 2, 1981 (App. ____). By order dated September 17, 1981 (App. ____) the Court of Ap-

peals denied rehearing and rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, Amendment 5.

No person shall. . . be deprived of life, liberty, or property, without due process of law. . .

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961ff.

1961. Definitions:

As used in this chapter –

(1) "Racketeering activity" means (A) any act or threat involving. . . arson. . . which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under. . . 18 U.S.C. . . . Section 1341 (relating to mail fraud). . .;

(4) "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "Pattern or racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. . . .

1962. Prohibited Activities.

(C) It shall be unlawful for any person employed by or associated with any enterprise. . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

Federal Rules of Criminal Procedure.

Rule 8(b). Joinder of Defendants.

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder.

If it appears that a defendant. . . is prejudiced by a joinder of offenses or of defendants. . . for trial together, the court may. . . grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT OF THE CASE[1]

From 1972 until mid-1976, the city of Tampa, Florida was plagued with a rash of residential and commercial arsons. There was no question but that the fires were deliberately set. Typically no attempt was made to conceal or remove evidence of arson. Almost invariably gasoline cans were left on or near the premises and were recovered by fire investigators. An unusual method of ignition linked most of the fires, which were started by placing plastic containers of gasoline atop electric hot plates, which melted the containers and ignited the gasoline, the fire then spreading to other parts of the doomed buildings by following gasoline trails that had been laid in advance. This and other common features suggested that the fires were the work of a single person or of a single group of persons operating together. (R. 66/106-123; 67/14-41, 56-65, 73-79, 97-116, 127-129, 136-141; S.R. 3, 6B/7, 7A/13).

Although the origin of the fires was similar in each case, the nature and condition of the burned buildings, and the circumstances under which they were burned, varied widely from case to case. The structures ranged from abandoned and dilapidated rental houses to a nearly new office and apartment building that was fully occupied and making a healthy profit. In several instances a building's owner had made substantial increases in his fire insurance coverage, or a property had changed hands and been heavily insured

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[1]Martino's Statement of the Case is taken from the evidence presented by the government at trial. All record references are to the record as bound and paginated in the Court of Appeals. Volumes 1-8 include the pleadings and orders; volumes 9-16 consist of transcripts of pretrial hearings; and volumes 17-92 include the transcript of most of the trial. Because of omissions in the original record, it was necessary to certify three supplemental records to assemble a complete record of the trial.

by the new owner, shortly before a fire. Other properties had been under the same ownership for many years with no change in coverage. Some were underinsured; a few were not insured at all.

In the investigation by the Tampa Fire Department the name of Willie Noriega began to appear with increasing frequency. Noriega was the owner of record of one of the burned buildings, and he had owned several others but transferred title shortly before a fire. He had a history of involvement with fires since 1963 when, at 19, he set fire to his mother's house in Tampa and was arrested by the Tampa Fire Marshal while sitting outside watching the flames. (R. 51/395; 52/625-626). On that occasion he was diagnosed as a paranoid schizophrenic by a psychiatric panel and was committed to a mental hospital for several months. (R. 51/396-400). Noriega's whereabouts and activities from that time until 1972 are not indicated in the record.

On several occasions in 1974 and 1975 Noriega was seen by policemen and firefighters at fire scenes. On one occasion a policeman observed him to be in an apparent state of sexual excitement while watching a fire at a large commercial building. (R. 28/11, 46; 51/408-409; 52/577-578, 625-626; 64/110, 144; S.R. 3, 4C/23). The first solid evidence of his involvement in the fires was discovered in November 1975, when a residential fire was extinguished before serious damage had been done. On this occasion investigators were able to recover identifiable fingerprints from gasoline containers discarded in the building. Some of those fingerprints, when compared with Noriega's proved to be a match.[2] As a result of this discovery Noriega

[2]In addition to Noriega's the fingerprints of Paul Guarino, a defendant in this case, were recovered at the same fire scene. (R. 67/150-154).

was indicted for arson by the Hillsborough County State's Attorney. (R. 53/742).

While the state arson charge was pending, Noriega initiated conversations with FBI agents and federal prosecutors that eventually resulted in the indictment in this case. In a series of interviews beginning in June 1976, Noriega told the federal officials that he had personally set scores of residential and commercial fires in Tampa since 1972, alone or in conjunction with one or more regular associates with whom he habitually fraternized at the Tampa dog track and at several bars in the city.[3]

Noriega claimed that he had set all the fires as business propositions, and that in every case he had either been paid to burn a building by the owner, who intended to collect insurance proceeds from the fire, or in the case of properties that he and his associates bought and burned, the previous owners, the realtors, or both, were privy to his plans and received kickbacks for dealing with him. Noriega also said that an insurance adjustor, Joseph Carter, was a regular associate who assisted him in obtaining inflated amounts of insurance on the properties he bought, and also assisted in processing fraudulent insurance claims after fires. He further stated that the Tampa Fire Marshal, Joe Gomez, had known of his arson activities for many years, had been a joint venturer with him in purchasing several properties intended to be burned, and had been protecting him from arrest throughout the

[3]The persons Noriega identified as regular associates in arson activities were Paul Guarino, Frank Scionti, Alex Fekete, Victor Arrigo, and to a lesser extent Joseph Macaluso and John Holt.

period.[4] Among the persons Noriega described as either paying him to burn their own property or assisting him in obtaining property to burn for his own account were several well known Tampa businessmen, including an architect, Joseph Russello, and two estate dealers, Berton Chase and Sam Martino.

Martino's first contact with Noriega occurred in November 1973, when Noriega applied to the Ybor Loan Company, of which Martino was president, for a $1,500 mortage loan to repair and refurbish a house on Nebraska Avenue in Tampa he had recently bought. Neither Martino nor his real estate company, M & S Investments, was involved in the purchase arrangements. Noriega had dealt directly with the previous owner and her attorney in contracting to purchase the property for $500 down and a purchase money mortgage. He approached Martino after executing the contract in October. (Noriega testified that he got a separate loan of $7,000 on the property, using $500 of for the down payment, paying $1,500 to Martino as a kickback, and using the rest to buy fire insurance. Unlike the case with other loans, no record existed of this loan or of any transfer of funds attributable to its disbursement or repayment). In December 1973 Noriega transferred title to Joseph Macaluso, who assumed the second mortgage loan. In February 1974 Noriega burned the building. The second mortgage loan was repaid to Ybor Loan Company from the proceeds of Macaluso's fire insurance policy.

In January 1974 Noriega bought an old four-unit apartment house on Columbus Drive in Tampa. The terms of

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[4]In reliance on Noriega's account the government included Gomez, who had arrested Noriega in 1963, as a defendant in this case. Gomez was one of four defendants acquitted at trial.

the purchase involved a small cash payment from Noriega to the seller, Bessie Williams, who reserved a life tenancy in one apartment, and Noriega's assumption of the existing purchase money mortgage of about $2,000 owed to the building's previous owners, a couple named Ferlita. Martino's only connection with this property was that Ybor Loan Company was servicing the purchase money mortgage, collecting the payments from Mrs. Williams and remitting them to the Ferlitas. In connection with Noriega's purchase of the building he obtained a second mortgage loan of $2,500 from Ybor Loan Company for repairs to the structure. At the time of the purchase there was an existing $4,000 insurance policy, which was raised to $8,000 to cover improvements and assigned to Noriega. (R. 49/111).

Through Carter Noriega obtained two more $15,000 policies, one of which indicated the insurable interest of Ybor Loan Company as second mortgagee. (R. 49/112). Martino received a copy of this policy in March, a few weeks after the fire at the Nebraska Avenue house. On receiving the new policy Martino sent the original policy to his agent for cancellation. That policy bears on its face a note in the agent's handwriting: "Per Sam can[el] at once. Other owner insured for $15,000 & he thinks bad news." (Martino Ex. 2-T). A cancellation notice was issued on April 6, but on April 15, six days before its effective date, Noriega burned the building. The purchase money mortgage and the second mortgage were satisfied out of the insurance proceeds. As in the case of the Nebraska Avenue house, Noriega said that Martino was aware of his plans and had taken a cash kickback. (R. 49/114). In fact, he said, he had learned of this building through Martino, who suggested it as a likely arson target and persuaded Mrs. Williams to sell it to him. Noriega also said that in

both transaction he and Paul Guarino were co-venturers, and that Guarino had assisted him in setting the fires.

On April 12, 1974, three days before Noriega burned the Columbus Drive property, the last transaction involving Noriega with which Martino was connected in any way was completed. A warehouse on Tenth Street in Tampa had been listed with M & S Investments, which took a one-year lease with a three month purchase option in December 1973. (Gov't Ex. 73). After the option expired in March 1974, Noriega's associate Alex Fekete made an agreement with the owner to purchase the fee interest subject to the M & S Investments lease, and made an agreement for Martino to assign the unexpired portion of the lease to him. Noriega did not appear as a party of record at any time. Martino was not involved in the financing of the purchase, which was arranged directly between Fekete and the previous owner. (R/49/175-188, 202).

Unlike the situation with most properties he bought, Noriega actually made substantial improvements and repairs to the warehouse, which he financed with a second mortgage loan from another Tampa real estate dealer, Berton Chase. According to Fekete it was not originally planned to burn this building; Noriega was planning to fit it out as a casino. (R. 62/15). On August 17, 1975, almost a year and a half after Fekete bought the property, and less than two weeks after Chase wrote Fekete a letter threatening foreclosure because of delinquency in payments on the second mortgage loan, Noriega burned the warehouse. No insurance was ever in force on the building, except a policy covering the security interest of the previous owner. Shortly after the purchase Fekete applied for a $50,000 policy, but he wrote a bad check for the initial premium and no policy was issued. (R. 62/21).

Noriega stated that he had planned from the beginning to burn the building after obtaining excessive insurance on it. Martino, he said, had suggested the idea to him and was originally a co-investor, but Noriega and Guarino, also a silent partner, thought Martino was asking for too large a share of the insurance proceeds, so they paid him $1,000 each for his interest, in addition to the $1,500 paid to M & S Investments for the unexpired term of the lease.[5]

Although Noriega continued to burn buildings throughout Tampa for more than two years after Fekete took over the warehouse lease, none of his subsequent fires was of a property with which Martino was in any way connected, whether as owner, broker or lender. The only subsequent contact Noriega ever had with Martino occurred after his June 1976 FBI interviews, when he went to Martino's office wearing a body recorder. Nothing was said that was deemed useful in the prosecution.

Noriega's disclosures to federal agents resulted in a request to the State Attorney to dismiss the arson charge against him (which was done); payment of substantial benefits under the Witness Protection Program; a plea arrangement under which he served nine months and received immunity from prosecution for any other disclosed offense, including minor roles in two murders unrelated to his arson activities; and ultimately in the return of a 35 count indictment charging 23 defendants (including himself, Carter and Arrigo, all of whom secured agreements for leniency and other benefits in exchange for

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[5]In addition to these transactions, Noriega said that Martino was involved indirectly in one other fire, a building owned by Jimmy Farina, a Tampa fireman, and other members of his family, which Noriega burned in February 1974. Noriega said that Farina paid him $400 to burn the building, which was insured for $4,000, and that Farina borrowed the $400 from Martino.

their testimony) with a conspiracy to conduct the affairs of an enterprise, and actually conducting its affairs, through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) & (d), and mail fraud in violation of 18 U.S.C. § 1341. Besides Noriega and Arrigo, three defendants – Guarino, Scionti and Macaluso – were alleged to have participated directly in arsons with Noriega and his other associates. The other 17, including Martino, were alleged either to have been property owners who paid Noriega to burn their own buildings, or to have sold property to Noriega or lent him money to buy property. In addition to the two RICO counts, there were 33 mail fraud counts, between 1 and 3 such counts for each of 16 fires.[6] Counts 1 and 2, the RICO counts, incorporated each of the mail fraud counts as predicate acts of racketeering, and also alleged acts involving five other fires for which no insurance claims hads been submitted. Martino was charged with eight counts of mail fraud involving three fires. Counts 9 and 10 related to the fire at the property of Jimmy Farina, which Noriega had said he burned for $400, Martino lending Farina the fee. Counts 11-13 alleged that in lending Noriega money on the Nebraska Avenue property Martino participated in a scheme to defraud in connection with which the mails were used on three occasions. Counts 14-16 charged that in making a second mortgage loan to Noriega for repairs on the Columbus Drive property, Martino participated in a scheme to defraud that also resulted in three mailings.

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[6]In the case of most fires there were two mail fraud counts, one charging submission of an insurance claim or an adjustor's report on the claim, the other charging the mailing of a check for the policy proceeds. Two fires generated three mail fraud counts each, and one fire managed only a single mail fraud count, whether because the claim was never paid or because the payment was delivered in person rather than through the mails is unclear.

Most defendants, including Martino, moved for severance on misjoinder and other grounds. In addition, along among the twenty defendants scheduled for a joint trial, Martino filed a separate motion for severance asserting that two co-defendants would give testimony denying Noriega's allegations as they related to Martino, but that each of them would invoke his privilege against self incrimination at his own trial, thus rendering his testimony unavailable to Martino in a joint trial. (R. 3/203-204). The motion was accompanied by affidavits of Farina and Guarino. Farina specifically denied the allegation that Martino had participated in a meeting or conversation with him and Noriega about burning the Farina house. Guarino's affidavit was more specific, and in particular explained why he could not take the stand at his own trial. Guarino acknowledged that he and Noriega had jointly purchased the Nebraska Avenue property and the warehouse. He also acknowledged generally other involvement with Noriega. He stated that Martino was not informed of Noriega's hidden interest in the warehouse when he assigned the lease to Fekete, and he denied that Martino had participated in discussions with him and Noriega about burning any of the buildings. All motions for severance were denied, and the seventeen people with whom Noriega said he dealt between 1973 and 1976 in his arson business were tried together, and together with the three additional defendants who Noriega testified were his fellow arsonists.

Trial commenced on November 7, 1977. The evidence required three months to complete. Noriega was the chief government witness. His testimony, describing each of the transactions in sequence, occupied a week. It was supported principally by testimony of Carter, Arrigo, and Fekete, although in some cases there was independent corroboration. No evidence corroborated Noriega's

testimony that Martino received kickbacks or participated in any advance discussions or plans for any fire. The most nearly corroborative evidence as to Martino was Carter's testimony that in May 1974, while processing Noriega's fire loss claim on the Columbus Drive apartment house, he visited Martino's office to verify coverage, remarking in the course of the meeting that Noriega and Guarino were "sticking their necks out" and he wished Martino would tell them to "cool it." (R. 56/45-50). Closing argument lasted for a week. The jury deliberated for three weeks, finally returning their verdicts on February 24, 1978. Four defendants were acquitted on all counts, including Fire Marshal Gomez, a bartender Noriega testified had helped him set two of the fires, and two property owners Noriega testified had paid him to burn their business premises – a sandwich shop and an electrical supply house. The other 16 defendants were convicted on some or all of the charges against them.

Martino was acquitted on Counts 9 and 10, which charged mail fraud in connection with the fire at the Farina house, and on Counts 11-13, charging mail fraud in connection with the fire at the Nebraska Avenue property which Noriega had sold to Macaluso.[7] He was convicted on Counts 14-16, charging mail fraud in connection with the burning of the apartment house on Columbus Drive. Every defendant found guilty of mail fraud in connection with any fire, including those who were not alleged to have been connected in any way with more than one, was also found guilty on the RICO counts, in accordance with the court's instructions authorizing the jury to find any defendant to have engaged in a "pattern of racketeering

[7]Farina and Guarino were convicted on Counts 9 and 10; Macaluso was convicted on Counts 11-13.

activity" if they found him guilty on at least two counts of mail fraud, regardless of whether multiple counts of mail fraud stemmed from a single act or different acts. Because of this instruction, and because there was no substantive count involving the uninsured warehouse on Tenth Street, it is impossible to determine from the record how or whether the jury resolved the allegation that Martino was culpably connected with its burning. For having lent Noriega $2,500 in January 1974, with the expectation of being repaid out of the proceeds of a fire insurance policy, Martino was sentenced to imprisonment for ten years on April, 21, 1978).[8]

In his appeal Martino asserted, *inter alia,* 1) that it was impermissible to predicate a finding that he participated in the conduct of the affairs of Noriega's enterprise through a pattern of racketeering acitivity, upon his commission of a single fraudulent act, merely because three separate charges of mail fraud flowed from that act; 2) that it was improper to charge a large number of persons, each of whom was alleged to have engaged in similar but factually unconnected conduct, the only common thread being that each of them dealt separately, and on differently occasions, with the same arsonist, and 3) that the aggregation of so many defendants lacking common purpose for trial in common was impermissibly prejudicial, and that Martino suffered additional particularized prejudice from the mass trial in that he was unable to present the testimony of two co-defendants specifically exculpating him.

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[8]In addition, a judgment was entered declaring a forfeiture of the $2,500 loan repayment and of Martino's interest in Ybor Loan Company and M & S Investments, of which he and his wife jointly owned 27 and 43 percent respectively. This petition raises no issue concerning the forfeiture judgment, except to the extent that it depends on the validity of Martino's RICO conviction.

The Court of Appeals affirmed. With respect to the meaning of a "pattern of racketeering activity", the Court held that each count of mail fraud could properly be considered as a separate and distinct act of racketeering, and thus that a defendant could be found to be a member of Noriega's enterprise, and to have conducted its affairs through a pattern of racketeering activity, by, for example, having on one occasion paid Noriega's fee to burn a house, even though he was not alleged to have had any other connection with Noriega, or any of his associates, or any other instance of criminal conduct, so long as the mails were used at least twice in processing his insurance claim. 648 F.2d at 402-404. Alternatively, as to Martino, the court held that he could be found to have participated in the conduct of the affairs of Noriega's enterprise by committing acts that had been charged in the mail fraud counts of which he was acquitted.[9] The court further held that the initial joinder of all defendants was proper because of the inclusion of a conspiracy count, without specifically discussing the assertion that the factual allegations of that count, consisting largely of allegations of

[9]"Martino points to his acquittal on several counts as support for his argument that his limited contacts with the enterprise, evidenced by his conviction on charges relating to only one fire, did not amount to participating in the conduct of the affairs of the enterprise. While the jury may not have found that the government proved Martino's guilt in the mail fraud scheme, that does not necessarily mean that the jury did not believe that Martino was somehow involved. The evidence of his involvement, while not sufficient to convict for mail fraud, would support the conclusion that he was associated with the enterprise and a participant in the conduct of its affairs". 648 F.2d, n. 15 at 396.

separate sequential undertakings, between factually unrelated defendants and Noriega, to perform similar but unrelated illegal services, failed initially to allege a single conspiracy and demonstrated that the proof, if it followed the allegations, would necessarily show multiple small and unrelated conspiracies. With respect to the alternative claim that, if a single conspiracy were alleged, the proof prejudicially varied by showing multiple conspiracies, the Court held that any variance was harmless, since there was sufficient evidence from which each defendant could properly be found to have been a participant in at least one such conspiracy.[10]

With respect to the argument for severance made on behalf of all defendants – that the trial was simply too massive to admit of fair consideration and determination, involving as it did twenty defendants and twenty-three lawyers, many with the same or similar names, crowded into a relatively small court-room with obstructions to vision, and over 200 witnesses testifying for three months about multiple similar transactions involving different defendants or small groups of defendants – the court acknowledged that the danger of undue prejudice was extraordinarily high, stating that

> "were it not for the manner in which Judge Hodges handled this obviously difficult trial and our review of the verdicts in light of the record, we might be prone to agree with appellants. We finally resolve this contention by 'look[ing] to the verdict. Convictions will invariably be sustained

[10]"If the Government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights". 648 F.2d at 382.

> if it may be inferred from the verdict that the jury "meticulously sifted the evidence" as where it acquits on certain counts' . . . . Although coming close, defendants have not met the burden to compel our finding of an abuse of discretion". 648 F.2d at 386.

The court's opinion makes no reference to Martino's individual claim that he suffered additional prejudice, beyond that suffered by all defendants in this mass trial, as a result of being unable to present exculpatory testimony of two co-defendants that would have been available in a separate trial.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION TO DETERMINE ISSUES OF EXCEPTIONAL PUBLIC IMPORTANCE CONCERNING THE MEANING AND APPLICATION OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, FOR WHOSE RESOLUTION THE WIDE VARIETY OF FACT PATTERNS IN THIS CASE RENDERS IT A UNIQUELY APPROPRIATE VEHICLE, AND WHICH WERE DETERMINED BY THE COURT BELOW IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The opinion below was announced simultaneously with this Court's decision in *United States v. Turkette,* ____ U.S. ____, 69 L.Ed.2d 246 (1981). Although the questions presented here are different, they are related to the issue decided in *Turkette* and to this Court's reasons for that decision. The larger consideration common to both, the germ of whose resolution can be found in *Turkette,* arises from the awesome breadth and scope of RICO and by its undeniable capacity for abuse – its capacity to generate

trials of such length and complexity, involving so many people, that the integrity of the fact finding process must at some point come to be suspect.

The distinction between legitimate and wholly illicit organizations as enterprises, which this Court rejected in *Turkette,* was a crude and probably ineffective device to contain the application of RICO within manageable bounds. In relegating persons alleged to be members of criminal syndicates to trial upon only the traditional charges of conspiracies and substantive offenses independent of RICO, that crude distinction to some extent would have protected persons whose connection with organized criminal activity was too casual, sporadic or fleeting, even if culpable, to justify requiring them to answer charges of crime in the company of persons to whom crime is a way of life. But by excluding organized criminal syndicates from the reach of RICO, that distinction excluded precisely those associations with which Congress was most deeply concerned in enacting the statute. In rejecting the licit-illicit distinction as an appropriate means of containing RICO's application within proper bounds, this Court mentioned, but had no occasion to discuss at length, the appropriate mechanism to achieve that result – the requirement that the enterprise be conceptually distint from the illicit activities in which it engages, a distinction preserved by insisting that a defendant's membership in or association with an enterprise be shown by evidence that he and his alleged associates in fact functioned together as a continuing unit integral to an ongoing organization. "The [existence of an enterprise] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit". ____ U.S. ____, 69 L.Ed.2d at 254.

The implications of this requirement necessarily conflict with the decision below, for the Court of Appeals authorized the conviction of anyone who had any culpable contact with Noriega's arson business, no matter how limited in time, place or circumstance, as long as it was possible to frame at least two counts of mail fraud against him as a result of that contact. That approach is even cruder and less appropriate as a guide for the interpretation and application of RICO than was the licit-illicit distinction. It's inaptness – indeed, it's complete irrelevance – to the language or purpose of RICO is well illustrated by the two defendants whose RICO convictions the court below reversed, John Lostracco and Berton Chase. Lostracco was a real estate commission salesman. He arranged to sell Noriega a $1,500 house; Noriega said Lostracco knew he intended to burn it for the insurance, and that Lostracco expected to receive a higher than usual commission. Noriega, however, could not wait for the few days necessary to receive a deed, but proceeded almost immediately after leaving the real estate office to burn the building to the ground. As a result of Noriega's undue haste, the would-be sellers, who were not claimed to be privy to the fraud, found themselves with an insurance claim instead of a sale. They filed for and received the proceeds of their insurance policy through the mails. Noriega and Arrigo had to use strongarm tactics on the owners and on Lostracco to get a part of the proceeds. (R. 49/126-131; 64/50-51). The Court of Appeals found that Noriega's premature destruction of the property aborted the scheme, and accordingly it reversed Lostracco's two mail fraud convictions, the sole predicate for his RICO liability.

Berton Chase made Noriega a $12,000 second mortgage loan for repairs and improvements to a warehouse and, Noriega testified, took half of the proceeds as a kickback.

He further testified that a year later, with the loan in default, Chase personally ordered him to burn the building. Yet, despite a relationship in excess of a year with Noriega and his enterprise activity, Chase could not be convicted under RICO, the court below held, because his association did not contemplate the requisite two predicate crimes. The reason it did not contemplate two predicate crimes had nothing to do with the nature or extent of Chase's participation, but was solely the product of the fact that Alex Fekete paid the initial premium on an insurance application with a worthless check, and the policy was therefore never issued. That was why Chase had been charged initially only with RICO conspiracy, since that transaction, though it extended over a considerable period of time, was the only enterprise activity with which Chase was in any way connected. There were simply no substantive offenses with which he could be charged.

Under the analysis of the court below, had Noriega been able to wait a few days for a deed to be delivered before burning the house he agreed to purchase from Lostracco, Lostracco's RICO and mail fraud convictions would have been upheld. Had Alex Fekete not used a rubber check to pay his insurance premium, the court below not only would have affirmed Chase's RICO conspiracy conviction; it would have authorized a substantive RICO conviction and, of course, mail fraud convictions. For in that case there would have been an insurance policy; a claim would have been filed when Noriega burned the warehouse; and the mails undoubtedly would have been used at least twice. It is difficult to imagine any factors less pertinent to the propriety of RICO charges than Alex Fekete's ability to balance his checkbook, or Noriega's ability to restrain himself from burning a house until he could get title to it. The refusal of the court below to insist

on a qualitative analysis of the scope and extent of an individual's association with a RICO enterprise (and Noriega undoubtedly operated such an enterprise), and its reliance instead on simplistic mechanical determinants, poses at least as much danger of sweeping within the RICO net individuals who have no business there as did the licit-illicit distinction of excluding from the statute's coverage persons appropriately within it.

In recent years, as the tactic of adding RICO counts to indictments has become increasingly popular, there has been an explosion of litigation over the statute's application and meaning. More and more judicial time is required to resolve the issues so generated. Appellate opinions in RICO cases are becoming as long as the trials that engender them. RICO criticism in the law reviews and other learned journals has become a new cottage industry. The discord increases, and the waste of judicial resources continues to mount; only this Court can end it.

The focus of RICO is on continuing conduct. The prosecution is required to show, as to any defendant, his membership in the enterprise and that he conducted its affairs through a *pattern* of racketeering activity. The concept of a pattern necessarily implies continuity and repetition, as the statutory language recognizes. "Pattern of racketeering activity" is not defined in terms of offenses; it is defined in terms of conduct, of *acts,* and then only in terms of the bare minimum that, under any circumstances, may be found to be a pattern. A pattern "requires at least two acts of racketeering activity. . . .," 18 U.S.C. § 1961(5), but two separate predicate acts are not necessarily enough to constitute a pattern. Two counts of mail fraud do not equate with two acts, as this case demonstrates. A single wrongful act may result in any number of counts under 18 U.S.C. § 1341, depending on

how many mailings it causes. RICO is not concerned with such fortuities, nor with the ingenuity of pleaders to describe the same thing in multiple ways.

In *Turkette* this Court had no occasion to deal authoritatively with this question. The only defendant before this Court was Novia Turkette, the heart, soul and brains of the enterprise under consideration there. Turkette headed an enterprise that specialized in robbing pharmacies and also engaged in arson for profit as a side line. He planned and participated in every robbery, organized the sale of the stolen drugs, and arranged every arson in which the group engaged. In such a case there is little to be gained by discussing the question of what nature and degree of connection with an enterprise is required to justify a finding of membership in it or participation in the conduct of its affairs. Turkette *was* the enterprise. It is as though, in this case, Noriega was the principal defendant instead of the government's star witness, and he entreated this Court to use his case to set the standards by which to determine the boundary between RICO liability and garden variety criminal conduct not constituting membership in an enterprise.

This case, in its present posture, is uniquely suited for resolution of this critical question, not only because of the particular factual relationship between Martino and enterprise activity, but because of the wide variety of relationships between the several defendants and Noriega's enterprise. They reach as close to the core of enterprise activity as Paul Guarino, who stands convicted of actually setting at least seven fires with Noriega, and who indeed has admitted his participation, not only by the necessary implications of the pretrial affidavit in which he denied Martino's participation, but also by express acknowledgment when he stood before the District Court to be sentenced. (R.

92/100-103). And, as fleeting and tenuous as Martino's own contacts with the enterprise were, it must be acknowledged that there are other defendants who the evidence places even farther from enterprise membership than he. For example, the government's whole case against Jimmy Farina can be stated in a single sentence: In January 1974 Farina paid Noriega $400 to burn a building, for which loss he filed an insurance claim in whose processing the mails were used twice. To the extent that determination of RICO membership and participation involves any line drawing exercise, there will be found in this case two defendants closely ranged on either side of that line, no matter what its ultimate location may be.

A more individualized, but still compelling, reason this Court should exercise jurisdiction in this case is the stunning departure by the court below from the accepted course of judicial proceedings, in its off-hand holding that Martino could be found to be a member of Noriega's enterprise by assuming his guilt of crimes of which he was acquitted. There is no support, either in the record of this case or in principles of constitutional adjudication, for such a decision. The court below placed heavy reliance upon Noriega's testimony that Martino participated in a scheme to defraud in connection with the fire at the Nebraska Avenue house. Repeatedly the opinion states that Martino knew Noriega's purpose when he made the loan on that property, that he expected repayment out of fraudulently obtained insurance proceeds, and that he accepted a kickback from Noriega. That testimony was precisely, and solely, the basis for the mail fraud charges against Martino in counts 11-13, on all of which he was acquitted. The question of Martino's participation in Noriega's fraudulent scheme was exactly what the jury determined in his favor on those counts. There was no

question but that there was such a scheme. Noriega testified about it; the jury convicted Macaluso of participating in it, even as they acquitted Martino. Nor was there any question that Martino made a loan on the property; he produced the records himself. He denied knowing what Noriega intended to do with the house and he denied accepting a kickback. It was only by rejecting Noriega's testimony on that point that the jury could have returned its verdicts of not guilty. Those issues are conclusively determined in Martino's favor, *Ashe v. Swenson,* 397 U.S. 436 (1970); *Sealfon v. United States,* 332 U.S. 575 (1948), and that determination may no more be impeached by an appellate court in search of grounds for affirming a RICO conviction than by a subsequent jury upon another trial.

For such a radical and obvious departure as this from the precepts of the Constitution and from principled adjudication, it would be appropriate for this Court to reverse that decision summarily without plenary consideration. No imaginable justification can be advanced for it.

At the core of this Court's statement in *Turkette* that membership in an enterprise requires continuity as well as an integral relationship to enterprise activity. i.e., "evidence that the various associates function as a continuing unit", 69 L.Ed.2d at 254, are the same considerations of commonality of purpose about which this Court spoke at length in *Kotteakos v. United States,* 328 U.S. 752 (1946). It would be difficult to invent a case more nearly identical to *Kotteakos* – in structure, evidence, or procedure – than this. Had RICO been enacted 30 years earlier, the *Kotteakos* indictment could have been drafted using language virtually identical to that here, differing only in that the scheme to defraud revolved around

obtaining fraudulent FHA loans instead of defrauding insurance companies.

There was unquestionably an enterprise in *Kotteakos;* this Court used that very word to describe Simon Brown's business of procuring fraudulent loans in exchange for a percentage of the proceeds, 328 U.S. at 769, and Brown himself testified at length about how he did it, in a mass conspiracy trial of nineteen of the people for whom he had secured such loans. Thirteen of these were submitted to a single jury, which convicted seven of having participated in a conspiracy with Brown. Four appealed, assigning error in their joint trial for a failure of proof that they acted pursuant to a shared common purpose so as to permit characterization of them as being "all parties to the enterprise," 151 F.2d at 170, a contention with which the Court of Appeals agreed. There was no common element in the case but the similarity of offenses and the continuing presence of Brown. However, the Court of Appeals thought the error harmless because there was evidence from which the jury could have found that each defendant at least participated in a separate conspiracy with Brown, and also because analysis of the verdicts indicated that the jury had picked through the allegations against the various defendants with a high degree of care and patience. This Court reversed, stating that although such considerations may be valid in a short trial with few defendants, simple evidence, and a minor variance, *Berger v. United States,* 295 U.S. 78 (1935), they weaken as trials lengthen and the number of defendants increases; they are utterly inadmissible in a case as long, and with as many defendants whose guilt or innocence must be considered by a single jury, as *Kotteakos.* In such cases, this Court held, the danger of finding guilt by transference, or confusion of evidence, becomes simply too great to tolerate. Not even

the highest degree of care by a trial judge nor the most conscientious deliberations of a jury, may be advanced to uphold verdicts arrived at in such a proceeding.

Kotteakos remains this Court's definitive statement of the principles by which to determine whether verdicts reached in a mass trial may be upheld. To the extent there are differences between this case and *Kotteakos,* they weigh the more heavily against tolerating the determination of mass guilt authorized below. This trial was longer, the evidence more complex, and the defendants more numerous. There is no more common purpose shown here than there, nor any more close or continuous connection between Noriega and Martino (or most other defendants here) than between Brown and his customers. Except for the three who were accused of actually setting fires with Noriega, every defendant's RICO convictions rest on mail fraud convictions involving only a single fire, and in only two instances were as many as two of them convicted in connection with the same fire. If there is any factor here on which an argument for affirmance can be predicated, it is the existence of RICO charges in the indictment, absent of course in *Kotteakos.* To advance such an argument in the face of in *Kotteakos* is to assert that the enactment of RICO overruled this Court's decision in that case, an assertion that shows some signs of acceptance in lower court opinions[11]

Such an assertion, if accepted, is a virtual guarantee of a continued explosive increase in the practice of bringing RICO charges in lieu of or in addition to more orthodox criminal charges. Every prosecutor worth his salt knows that the willingness of appellate courts to acknowledge

[11]E.g., *United States v. Elliott,* 571 F.2d 880 (5th Cir. 1978).

reversible error decreases in direct proportion to increases in the length of trial, and RICO whatever else may be said of it, is undeniably the most effective device ever invented for lengthening trials. If the statute comes to be viewed as a procedural device to justify otherwise impermissible joinders of multiple defendants, the momentum may become irresistible. A short of Say's law of pleading will inevitably operate, as RICO indictments drive out others. This Court must address that trend, and soon, before it is too late.

The traditional justification for mass trials – saving time by eliminating repetition of the same evidence – has no application in a case such as this. With very minor exceptions, there was no evidence here that would have been repeated in separate trials. Noriega's testimony is reminiscent of a volume of similar short stories, moving from defendant to defendant as it advances along the four-year history of his enterprise Because of the inherently sluggish movement of any trial in which over fifty people, including twenty-three lawyers, are occupying a single courtroom, it is quite probable that separate trials of all defendants, conducted back to back, would have been completed in less total time than was required for this case. Many of the individual trials probably could have been completed in less than a full day.

The enactment of RICO did not and cannot overturn a decision that rests on constitutional underpinnings. This Court did not address technical considerations in *Kotteakos,* and it rested its decision on none. The question it addressed there was what kind of proceeding may be called a fair trial, the constitutional limits to which bodies may be jammed inside courtrooms without fatally infecting the integrity of the deliberative process. No statute may repeal, overrule or limit a decision so grounded; only

a judicial retreat from first principles can do that. The decision below illustrates the danger that such a retreat may occur — may now be occurring. If it is to be stopped, if we are to remain true to our oft-proclaimed boast that we differ from totalitarian societies in large part because we demand that determinations of guilt or innocence be individual and personal, this Court must address those questions in a case in which a mass trial has put that boast at risk of becoming a mere slogan. Until we begin conducting trials in amphitheaters instead of courtrooms, there will be no case more starkly presenting that risk than this.

If the sheer length and complexity of the proceedings, and the number of factually unrelated defendants and transactions crowded together, are not sufficient to require that this Court accept jurisdiction, then the additional factor of special individual prejudice resulting from such a collocation must tip the scales. Martino's inability at this trial to present critical evidence in his defense, because it was possessed by co-defendants who could not or would not be examined in a trial in which their own guilt or innocence was to be determined, is hardly unique; his plight will become increasingly common as more and more people are crowded into the dock for common trial. It is a truism that most persons accused of crime are guilty of something, whether the crime charged or not. In many such cases the only rational defense is to put the government to its proof. Often people who face such a situation are the most likely to have critical information about the participation, or lack of it, of other people accused together with them. A mass trial may not have been devised for the specific purpose of depriving defendants of a realistic opportunity to obtain and present defensive evidence, but it cannot be denied that it has that effect. If everyone with reason to know the critical facts relating to an accusation is tried together, and if those with the most

reason to know those facts have the least reason to testify in their own defense, the right to present a defense becomes meaningless. It is a significant commentary on the prejudice and confusion that must inevitably result from such trials that not one word in the 44 page opinion of the court below addresses this question, or even indicates the court's awareness that it was raised.

It has become *de rigeur* for appellate opinions in cases such as this to proclaim our commitment to individual determinations of guilt or innocence, and ritually condemn mass trials, but in the end to acquiesce in their conduct. It is time to cease condemning mass trials and to commence forbidding them.

CONCLUSION

For the reasons stated herein, petitioner Sam C. Martino respectfully submits that this case presents issues of such exceptional public importance, and with such overwhelming probability of recurrence, that this Court should issue its writ of certiorari to the Court of Appeals and call up the record in this case for plenary consideration of those issues, and upon consideration to reverse that Court's judgment and remand the case for such further proceedings as may be appropriate as to any counts remaining in the case.

Respectfully submitted,

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Appendix

81-907

No.

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IN THE
Supreme Court of the United States
OCTOBER TERM 1981

SAM C. MARTINO,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

UNITED STATES of America
Plaintiff-Appellee,

v.

Sam C. MARTINO, Joseph C. Russello and Rolando Gonzalez Rodriguez,
Defendants-Appellants.

UNITED STATES of America
Plaintiff-Appellee,

John Alan HOLT, Rosario Palermo, William H. Brown, a/K/a Bill, John D. Fisher, Robert D. Young, Joseph Macaluso, a/k/a Joe, Frank Scionti, John Nicholas Lostracco, Sam C. Martino, Paul Guarino, Jimmy Farina, Berton B. Chase, a/k/a Bert, Rolando Gonzalez Rodriguez, a/k/a Roland Rodriguez, Joseph D. Lazzara, a/k/a Joe, Joseph C. Russello, a/k/a Joe and Amalia Morgado,
Defendants-Appellants

UNITED STATES of America,
Plaintiff-Appellee,

v.

Sam C. MARTINO
Defendant-Appellant.

Nos. 78-3611, 78-5260 and 78-2606.

United States Court of Appeals,
Fifth Circuit.

June 19, 1981.

Appeals from the United States District Court for the Middle District of Florida.

Before TUTTLE, VANCE and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

In the decade following enactment of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, prosecutions under that Act have begun to follow the recognizable patterns we noted in *United States v. Malatesta,* 583 F.2d 748 (5th Cir. 1978), *aff'd on reh. on other grounds,* 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied,* 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). The cases are characterized by lengthy indictments involving multiple defendants charged with diverse criminal activity. In the style of that embryonic tradition this appeal presents sixteen defendants with a combined total of eighty convictions.

The prosecutions we review were commenced by an eighty-three page, thirty-five count indictment, charging twenty-three defendants with mail fraud, RICO conspiracy and RICO substantive violations, specifying sixty-nine overt acts and fifty-six predicate acts of racketeering activity. Three defendants entered guilty pleas. The remaining twenty were jointly tried before a jury in a trial spanning three months. After deliberating three and one-half weeks, the jury found four defendants not guilty and sixteen defendants guilty of one or more counts; all ap-

peal.[1] The supplemented record on appeal includes 8 volumes of pleadings, nearly 100 volumes containing more than 11,000 pages of the testimony of over 200 witnesses, and 5 boxes of exhibits.

The indictment resulted from an investigation of a large number of suspected acts of arson occurring in Tampa and Miami, Florida between July 1973 and April 1976. The indictment charges that a group composed of an insurance adjuster, homeowners, promoters, investors and arsonists associated for the purpose of committing arson with the intent to defraud fire insurers. This association of individuals is characterized as an "enterprise," thus bringing the offenses within the purview of RICO, 18 U.S.C.

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[1]The following concurrent sentences were imposed: GUARINO – Counts 1 l& 2: 12 years per count, Counts 3-10, 14-20; 5 years per count; SCIONTI – Counts 1 & 2: 12 years per count, Counts 3-6: 5 years per count; FARINA – Counts 1 & 2: 9 years per count; LOSTRACCO – Counts 1 & 2: 9 years per count, Counts 17 & 18: 5 years per count; MARTINO – Counts 1 l& 2: 10 years per count, Counts 14, 15 & 16: 5 years per count; MORGADO – Counts 1 & 2: 9 years per count, Counts 21 & 22: 5 years per count; MACALUSO – Counts 1 & 2: 9 years per count; count, Counts 7, 8, 11, 12 & 13: 5 years per count; LAZZARA – Counts 1 & 2: 10 years per count, Counts 5 & 6: 5 years per count; RODRIGUEZ – Counts 1 & 2: 8 years per count, Counts 7 & 8: 5 years per count; RUSSELLO – Counts 1 & 2: 10 years per count, Counts 28 & 29: 5 years per count; CHASE – Count 1: 6 years; PALERMO – Counts 1 & 2: 8 years per count, Counts 3 & 4: 5 years per count; BROWN – Counts 1 & 2: 8 years per count, Counts 30 & 31: 5 years per count; FISHER – Counts 1 & 2: 8 years per count, Counts 32 & 33: 5 years per count; YOUNG – Counts 1 & 2: 8 years per count, Counts 32 & 33: 5 years per count; HOLT – Counts 1 & 2: 9 years per count, Counts 21 & 22: 5 years per count (Youth Corrections Act).

§ 1962.[2] Count 1, of which the sixteen defendants were convicted, charges a conspiracy to violate RICO, § 1962(d). Count 2, of which fifteen defendants were convicted, charges a substantive violation of RICO, § 1962(c). Counts 3 through 35 charge various defendants with violations of the mail fraud statute, 18 U.S.C. § 1341,[3] and aiding and abetting, 18 U.S.C. § 2,[4] arising out of the fil-

---

[2]18 U.S.C. § 1962 provides in part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

[3]18 U.S.C. § 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[4]18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

ing of insurance claims and receipt of payments for the losses resulting from the arsons.

Several issues are presented on appeal; some are common to all appellants, some to more than one, and some apply to only a particular appellant. Each appellant has filed a brief in which the arguments advanced by all other appellants are adopted. We shall, in general, address the common issues first and then review those issues pertinent to only a single appellant.

I. The Setting—The Cast

A summarization of the facts concerning each of the fifteen fires and subsequent insurance claims is set forth in the Appendix. We discuss these facts in somewhat greater detail during consideration of various contentions of insufficient evidence to support the convictions. An overview of the charged conspiracy and enterprise, however, facilitates an understanding of the application of RICO, particularly because the degree of involvement varied with each defendant.

The arson ring began operating in 1973 when Paul Guarino and Frank Scionti hired Willie Noriega as their principal "torch." At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds.

Different roles were played by those defendants comprising the enterprise. Joseph J. Carter was the insurance

adjuster who, with knowledge of the arson, processed fire loss claims. In return for this service and for guiding others to insurance agencies where fire insurance could be secured in excess of the value of substandard property, Carter received a portion of the insurance proceeds. He pled guilty to nineteen counts and testified as a government witness.

Willie Noriega, the primary arsonist, pled guilty to all 35 counts and testified as the key government witness. Noriega was assisted in the "torching" by Paul Guarino, Frank Scionti, Joseph Macaluso and Victor Arrigo, who also testified as a government witness after pleading guilty to seven counts.

Sam C. Martino and Berton B. Chase provided financing for some of those who bought property targeted to be burned. Martino was in the real estate business and, in addition to arranging loans, located substandard property for use in the scheme. The defendants who acquired or aided in the acquisition of targeted property, secured excessive insurance and collected insurance payments included Carter, Guarino, Martino, Noriega, Macaluso, Amalia Morgado, John D. Fisher and Robert D. Young.

Several defendants already owned premises, mostly substandard, covered by fire insurance. They needed only the services of the arsonists and, in some instances, claims assistance. This group included Jimmy Farina, Joseph D. Lazzara, Rolando Gonzalez Rodriguez, Joseph C. Russello, John Alan Holt, Rosario Palermo and William H. Brown.

Finally, there were those who served as the contacts or go-betweens for persons who owned property they wished to have burned, or who wanted to acquire property for that purpose, and the arsonists. These "marketers" or

"brokers" included Carter, Guarino, Scionti, Morgado, Martino and John Nicholas Iostracco.

With the basic structure of the "enterprise" and the roles of the various defendants in perspective, we now consider the assignments of error.

A. Constitutionality of RICO

The RICO statute is challenged on five grounds, that, in the main, have been considered and dismissed in earlier cases. It is contended that RICO (1) punishes associational status, (2) does not apply to enterprises engaged solely in criminal activity, (3) is unconstitutionally vague, (4) operates *ex post facto*, and (5) is contrary to the Ninth and Tenth Amendments.

[1] In *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978), we rejected the argument that RICO unconstitutionally punishes associational status; "its proscriptions are directed against conduct, not status." *Id.* at 903. Also in *Elliott*, and recently reaffirmed in *United States v. Diecidue*, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 445 U.S. 946, 446 U.S. 912, 100 S.Ct. 1345, 100 S.Ct. 1842, 63 L.Ed.2d 781, 64 L.Ed.2d 266 (1980), we held RICO applicable to a group whose sole purpose was to engage in illegal activities. Appellants request a reconsideration of that position in light of contrary opinions from other circuits.[5] We are aware of the criticisms leveled at our deci-

[5] *See, e.g., United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, ___U.S.___,101 S.Ct. 938, 67 L.Ed. 2d___(U.S. 1981) (No. 80-808), argued April 27, 1981, 49 U.S L.W. 3831; *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980).

sions and we recognize that appellants' position is arguably meritorius. What appellants request, however, is not a course available to this panel but is a prerogative only of our court sitting *en banc.*

[2] Appellants' third contention, that RICO is unconstitutionally vague, was rejected in *United States v. Hawes,* 529 F.2d 472, 479 (5th Cir. 1976), in which we held that a person of average intelligence, upon reading the statute with the aid of relevant definitional provisions, "could not help but realize that they would be criminally liable for participating in 'any enterprise,' including their own, 'through a pattern of racketeering activity.'"

[3] Whether RICO is unconstitutional as an *ex post facto* law because of judicial enlargement is a question never before considered by us. The defendants argue that by applying RICO to illegitimate as well as legitimate enterprises, we have deviated so far from an average person's understanding of RICO that an *ex post facto* effect results. It is not every judicial expansion of statutory construction that creates an *ex post facto* law; rather, it is only those which are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie v. City of Columbia,* 378 U.S. 347, 354, 84 S.Ct. 1697, 1703, 12 L.Ed.2d 894 (1964), *quoting* Hall, *General Principles of Criminal Law* at 61 (2d ed.1960).

[4] "Enterprise" is defined in § 1961 to include "any . . . group of individuals associated in fact although not a legal entity." This language is broad and nonrestrictive. It is not unreasonable to suggest that this language encompasses groups associated for the purpose of committing arson with the intent to defraud. This general, non-specific language negates the contention that expansive judicial interpretation is either unexpected or indefen-

sible. We do not find that the interpretation given to RICO by this court has so deviated from what would be an average person's understanding that an *ex post facto* effect has occurred. This contention of constitutional abrogation is infirm.

[5] We likewise reject the proposition that RICO violates the Ninth and Tenth Amendments. Appellants assert that RICO intrudes upon state sovereignty because the statute fails to require that the acts of racketeering *per se* affect interstate commerce. This argument ignores the essence of RICO which proscribes the furthering of the enterprise, not the predicate acts. The predicate acts are, in turn, proscribed by existing, enumerated state or federal laws. *United States v. Bright,* 630 F.2d 804 (5th Cir. 1980). Appellants were not convicted of the state offense of arson; they were all (except Chase) convicted of the federal offenses of mail fraud and of conspiring to participate and participating in the affairs of an enterprise affecting interstate commerce.

We conclude and hold that the five grounds upon which appellants challenge the constitutionality of RICO are without merit.

B. The Indictment

[6] The indictment is challenged on several grounds, including insufficiency, duplicity and misapplication of RICO. It is also contended that there is a variance between the indictment and the evidence. First, it is argued that the required effect of interstate commerce is not sufficiently alleged. Like the indictment in *Diecidue, supra,* the instant indictment tracks the language of the statute as to the effect on interstate commerce. The indictment further

charges that the defendants "did knowingly and willfully place and cause to be placed . . . in authorized depositories for mail matter to be sent and delivered according to the directions thereon by the Postal Service of the United States." The effect on interstate commerce is sufficiently alleged.

[7] Appellants contend that Count 1 charges multiple conspiracies and therefore the indictment is duplicitous. Appellants insist that each fire listed constitutes a separate conspiracy. To the contrary, "[t]he allegations addressed to the various substantive offenses committed as part of the conspiracy are merely descriptive of the single overall agreement." *Diecidue,* 603 F.2d at 546. The count is not duplicitous; it charges a single conspiracy involving several acts.

[8] It is next contended that the indictment is fatally defective because the appellants are charged under the wrong subsection of § 1962. It is argued that inasmuch as they are charged with associating with the other defendants, as the enterprise involved, they were mistakenly charged with violating subsection (c), rather than (b). This argument founders on the shoals of the language of RICO. Subsection (b) proscribes acquiring or maintaining an interest or control in an enterprise through a pattern of racketeering activity; subsection (c) makes it unlawful for one associated with or employed by the enterprise to participate in the conduct of its affairs through a pattern of racketeering activity. Appellants insist that § 1962(c) applies only to those who manage the enterprise, *i.e.,* the top coterie. We disagree. Section 1962(c) makes it unlawful to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." The word "conduct" is neither illusive nor mysterious, nor is its use unique to RICO. It is found in other statutes including, *inter alia,* 18

U.S.C. § 1955 which makes it a crime for one to conduct an illegal gambling business. In *United States v. Tucker,* 638 F.2d 1292 (5th Cir. 1981), we held that a waitress serving drinks to customers engaged in gambling conducts an illegal gambling business within the intendment of 18 U.S.C. § 1955. We concluded in *Tucker* that the word "conducts" simply means the performance of activities necessary or helpful to the operation of the enterprise.

[9] Finally, appellants cite *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), attacking the indictment on the ground that it alleges only one conspiracy while the government's evidence establishes multiple conspiracies. They contend that this results in a variance that substantially prejudiced their rights contrary to *Kotteakos.* We disagree. This argument has been considered in *Elliott, Diecidue,* and *Bright, supra,* and in *United States v. L'Hoste,* 609 F.2d 796 (5th Cir.), *cert. denied,* ____ U.S. ____, 101 S.Ct. 104, 66 L.Ed.2d 39 (1980). In *L'Hoste* we resolved this issue adverse to the appellants, stating: "If the government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights." 609 F.2d at 801, *citing United States v. Wayman,* 510 F.2d 1020 (5th Cir.), *cert. denied,* 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed.2d 67 (1975). Following the path of *L'Hoste,* we find no variance affecting the appellants' substantial rights.

We find no merit in any of appellants' challenges to the indictment.

C. Double Jeopardy

[10] Appellants submit that the government should have been forced to elect between Counts 1 and 2 because prosecution on both does violence to the double jeopardy clause which "protects against multiple punishments for the same offense." *United States v. Smith,* 574 F.2d 308, 309 (5th Cir.), *cert. denied,* 439 U.S. 931, 99 S.Ct. 321, 58 L.Ed.2d 325 (1978), *quoting North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). The "same offense" test may be simply stated: If there is any difference in the elements to be proven, the two instances are not the same offense. *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Application of the rubric to RICO violations requires pause and reflection because of the nature of the RICO statute. We bear in mind that under *Blockburger* we must determine if one offense requires proof of a fact not required by the other.

[11] Prosecution of RICO substantive and conspiracy charges expectedly involves considerable overlap in the evidence, especially where the enterprise exists as a consequence of persons associating and committing acts making up a pattern of racketeering activity. Such overlap does not occasion an automatic invocation of double jeopardy. *Iannelli v. United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975).

[12] A RICO substantive charge requires proof of the existence of an enterprise which affects interstate commerce and that the defendant participated in the conduct of the enterprise's affairs by committing at least two of the designated acts of racketeering activity. A RICO conspiracy charge requires the additional element of agreement; the defendant must have "objectively manifested an

agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes." Elliott,* 571 F.2d at 903 (emphasis in original). The Elliott court also stated that the agreement involved in a RICO conspiracy must include the vital element of agreeing to commit the predicate acts. Upon proof of the commission of racketeering activity, "the inference of an agreement to do so is unmistakable." *Id.* This statement has been interpreted to cast a shadow across the sun because it leads to the argument that the distinguishing element of subsection (d) (the agreement to violate) evaporates because proof of the substantive charge automatically includes proof of a conspiracy. *United States v. Anderson,* 626 F.2d 1358, 1368-69 n. 18 (8th Cir. 1980); Note, *Racketeers, Congress and the Courts: An Analysis of RICO,* 65 *Iowa L.Rev.* 837, 879 (1980). If the only evidence offered from which a jury can infer an agreement to participate in the enterprise is evidence of engaging in a pattern of racketeering activity, the requisites for applying the double jeopardy rule would appear to exist.

[13] Albeit persuasive, this argument glosses over the essential teaching of *Blockburger* and obfuscates the inquiry whether the two counts charge the same offense. The aegis of the double jeopardy clause of the Fifth Amendment is not invoked merely by showing that a jury had the opportunity to convict on two counts by drawing appropriate inferences from the same evidence. "[T]he *Blockburger* test looks *not* to the evidence adduced at trial but focuses on the elements of the offense charged." *United States v. Cowart,* 595 F.2d 1023, 1029 (5th Cir. 1979). That the distinguishing element can be proven by the same evidence as that used to convict on another count does not bring the offenses within the context of double

jeopardy. *United States v. Dunbar,* 591 F.2d 1190 (5th Cir. 1979), *aff'd on reh. on other grounds,* 611 F.2d 985 (5th Cir. 1980) (en banc). The RICO substantive and RICO conspiracy convictions are not vitiated by the double jeopardy clause.

D. Pre-trial Matters

Appellants request our review of certain pre-trial matters they contend constitute reversible error. These include motions for bill of particulars, requests for *Brady* material and the medical examination into Willie Noriega's competence to testify.

[14-16] It is argued that because of the complexity of the case, the motions for bill of particulars should have been granted to prevent confusion which hindered the defendants from understanding the nature of the charges against them. Action on a motion for bill of particulars is committed to the sound discretion of the trial judge. We may reverse a ruling denying the motion only if a defendant demonstrates that he was "actually surprised at trial and thus incurred prejudice to his substantial rights by the denial." *Diecidue,* 603 F.2d at 563. No such demonstration has been made to this court; there has been no abuse of discretion and no reversible error exists.

Appellants contend that the government failed to comply with the disclosure requirements of *Brady v. Maryland,* 373 U.S. 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny. They specifically call our attention to inconsistent statements made prior to and during trial by a government witness and a letter sent to the U.S. Attorney by a psychiatric expert for the government. The alleged inconsistent statements were made by a witness with respect

to a 1972 fire in which two arsonists died.[6] In her first statement to the police shortly after the fire, the witness said that Robert Bradwell (one of the arsonists who died) had told her that he had been robbed and set on fire by unknown persons. At trial, she testified that Bradwell had asked her to make that statement, but that he also told her what really happened: he had burned while he, Lester Oates and Paul Guarino set fire to the Kakeland Bakery.

[17-19] As impeaching evidence, the prior inconsistent statement would fall within disclosure requirements because *Brady* encompasses impeachment evidence as well as evidence favorable to the accused on the issue of guilt. *United States v. Auten,* 632 F.2d 478 (5th Cir. 1980). Failure of the government to disclose information useful only for impeachment, however, mandates reversal only if defendants demonstrate that the undisclosed evidence probably would have resulted in acquittal. *United States v. Anderson,* 574 F.2d 1347 (1978). It cannot be seriously contended that this one statement made by one of the more than one hundred government witnesses would probably have resulted in acquittal. The claim is devoid of merit.

[20, 21] The remaining asserted *Brady* violation concerns a letter written to the U.S. Attorney by the psychiatrist who served as the government's witness on rebuttal. In the letter the psychiatrist opined that Willie Noriega was not psychotic in 1963 but that he had self-induced psychotic symptoms by using drugs in an attempt to avoid prosecution for arson. The letter was given to the

[6]This fire was not the subject of a mail fraud count, but was named as an overt act in Count 1.

defendants after the doctor testified, consistent with the requirements of the Jencks Act, 18 U.S.C. § 3500. This disclosure expunged any earlier error because "when alleged *Brady* material is contained in Jencks Act material, disclosure is generally timely if the government complies with the Jencks Act." *Anderson,* 574 F.2d at 1352. This *Brady* claim is also without merit.

Pursuant to a defense request prior to trial, the trial court exercised its discretion and appointed an expert to conduct a competency examination of Noriega. *See United States v. Roach,* 590 F.2d 181 (5th Cir. 1979); *United States v. Jackson,* 576 F.2d 46 (5th Cir. 1978). The psychiatrist was instructed to examine Noriega and formulate an opinion about his present mental state and whether he was then able to differentiate reality from fantasy and accurately to remember and relate events that occurred during the prior five years. The expert determined Noriega was competent to testify at trial. Appellants insist the court erred in not requiring the psychiatrist also to determine Noriega's mental condition during the time period of the alleged offenses.

[22, 23] Whether a witness is competent to testify is a threshold question of law to be answered by the judge. *Roach, supra;* Wharton's Criminal Evidence, Vol. 11 § 377 (13th ed. C. Torcia 1972). It is left to the jury to assess a witness's credibility and the weight to be accorded his testimony. Because a witness's mental state during the period about which he proposes to testify is a matter which affects his credibility, it is a jury determination and thus not germane to competency to testify. We posted this trial in *United States v. Partin,* 493 F.2d 750, 762 (5th Cir. 1974), *cert. denied,* 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977):

> The readily apparent principle is that the jury should, within reason, be informed of all the matters affecting a witness's credibility to aid in their determination of the truth . . . . It is just as reasonable that a jury be informed of a witness's mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know, and correctly relate the truth.

See also Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981).

[24] In the case at bar the trial judge was not obligated to ask the court-appointed expert to determine Noriega's mental capacity at the time of the alleged offenses as well as his competence to testify. It would not have been error had the trial judge done so, for this would have been an additional item of evidence for the jury to consider in making its credibility assessment. Nevertheless, to decline to grant this defense request does not constitute reversible error. The defendants had ample opportunity to show Noriega's mental condition at the time about which he testified. Defense experts testified, as did acquaintances of Noriega who knew him during the arson spree. Furthermore, the jury was properly instructed to consider evidence of a witness's mental condition at the time of the incidents in judging the credibility of the witness and the weight to be given to that witness's testimony.

E. Joint Trial versus Severance

[25-27] Each appellant alleges prejudice by the joinder of his trial with the other defendants and that the trial judge committed reversible error in failing to grant the

repeated error in failing to grant the repeated motions for severance. Joinder was proper under Rule § 8(b), Fed. R.Crim.P. *See Bright, supra.* Accordingly, defendants must rely on Rule 14, Fed.R.Crim.P., which permits severance if a defendant is prejudiced by the joinder.[7] On a Rule 14 severance motion, the trial judge is required to weigh the prejudice inherent in a joint trial in light of the realities of judicial economy and to sever defendants as the needs of justice dictate. *United States v. McLaurin,* 557 F.2d 1064 (5th Cir. 1977), *cert. denied,* 434 U.S. 1020, 98 S.Ct. 743, 54 L.Ed.2d 767 (1978). The denial of a motion to sever is reversible only for abuse of discretion. An appellant's burden of showing prejudice is onerous; the general test is:

> whether under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? if so, though the task be difficult, severance should not be granted.

Peterson v. United States, 344 F.2d 419, 422 (5th Cir. 1965).

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[7]Rule 14, Fed.R.Crim.P., provides in pertinent part:

> If it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants in an indictment . . . or by such joinder for trial together, the court may . . . grant a severance of defendants.

To buttress their claim of prejudice, appellants submit an impressive litany: there were twenty defendants, most with Spanish or Italian surnames; thirty-five counts (only thirty-three remained after Noriega pled guilty) were charged, but many of the defendants were charged in only a few of the counts; the trial lasted three months; the jury heard over 200 witnesses, some testifying against many defendants, others testifying against only a few; and there were nineteen defense counsel and three prosecuting attorneys, all within the confines of a modest sized courtroom. Appellants argue that the totality of these facts created a "circus" atmosphere rather than that which should prevail for a serious criminal trial.

[28] We are keenly aware that joint trials, especially those involving numerous defendants and multiple charges, carry substantial risks of manifest unfairness. We do not encourage trials en masse. We must, however, reckon with the realities of this type prosecution. The Constitution does not guarantee a trial free from the burdens that inevitably accompany such a trial; rather, it requires that the potential for transferability of guilt be minimized to the extent possible in order to "individualize each defendant in his relation to the mass." *Kotteakos, supra; United States v. LeCompte,* 599 F.2d 81 (5th Cir. 1979), *cert. denied,* 445 U.S. 927, 100 S.Ct. 1313, 63 L.Ed.2d 759 (1980); *Elliott, supra.* We recently confronted this same issue in *United States v. Morrow,* 537 F.2d 120, 136 (5th Cir. 1976), *cert. denied,* 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977), and our discussion relative to severance is appropriate here:

> In reviewing a claim of undue complexity and confusion, an appellate court looks to the totality of the circumstances in striking a balance be-

tween the interest in judicial economy and the need to protect the rights of the individual defendant. A joint trial of twenty-three defendants, charged with conspiracy and numerous substantive counts, clearly raised the possibility that the jury might cumulate the evidence introduced by the Government on all counts and against all defendants to find guilty a defendant whose connection with the conspiracy was at best marginal. The pernicious effect of cumulation, however, is best avoided by precise instructions to the jury on the admissibility and proper uses of the evidence introduced by the Government. The remedy of severance is justified only if the prejudice flowing from a joint trial is clearly beyond the curative powers of a cautionary instruction. Where the Government charges a single conspiracy, as it did here, much of the evidence introduced ultimately bears, at least indirectly, on the agreement of the co-conspirators. Once the Government has satisfactorily established the existence of the conspiracy, the same evidence used to convict a particular defendant is admissible against all co-defendants shown to be members of the conspiracy. Given this state of affairs, the interest in judicial economy understandably exerts strong pressures in favor of a joint trial.

In the case *sub judice* Judge Hodges faced a formidable task. He conducted the trial with great skill and with a judicial professionalism much to be admired. He minimized the potential transference of guilt with every tool at his command. He gave careful, detailed instructions about the elements of RICO conspiracy and RICO substantive charges, doing so, as appropriate, as they related to each

defendant. Proper uses of evidence were explained. Judge Hodges met the burden of avoiding the "pernicious effect of cumulation."

[29] Notwithstanding the very skillful presiding of the trial judge, appellants argue that the totality of the circumstances were such that a jury had to be confused and unable to individualize the verdicts simply because of the volume of evidence which inundated them. We knowledge the validity of this concern and, were it not for the manner in which Judge Hodges handled this obviously difficult trial and our review of the verdicts in light of the record, we might be prone to agree with appellants. We finally resolve this contention by "look[ing] to the verdict. Convictions will invariably be sustained if it may be inferred from the verdict that the jury 'meticulously sifted the evidence' as where it acquits on certain counts." *Tillman v. United States,* 406 F.2d 930, 936 (5th Cir.), *vacated in part on other grounds,* 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969), *quoting* 8 Moore, *Federal Practice* ¶ 14.04[1], at 14-15 (2d ed. 1968). It is apparent from the verdicts reached that the jury, after more than three weeks of deliberation, did "meticulously sift" the evidence. Four defendants were acquitted on all charges; eight others were convicted on some charges but acquitted on others. Although coming close, defendants have not met the burden imposed to compel our finding of an abuse of discretion.[8]

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[8]We are mindful of our recent decision in *United States v. Diaz-Munoz,* 632 F.2d 1330 (5th Cir. 1980), where we found that the jury had not been able to evaluate each defendant's position properly. That case is not controlling. In *Diaz-Munoz* we found that misjoinder had occurred; in the case at bar joinder was proper. Furthermore, in *Diaz-Munoz* the jury deliberated for less than three hours (including lunch); in the case we review the jury deliberated over three weeks.

F. Trial Errors

Appellants allege reversible error because of prosecutorial misconduct, misconduct of defense counsel and various other trial errors. They maintain that whereas the alleged errors singularly might not be sufficient to mandate reversals, their cumulative effect denied appellants a fair trial, warranting reversals of the convictions. After examining each error assigned, we are compelled to disagree.

1. Jencks Act

[30, 31] Appellants condemn the manner in which the government conducted interviews with its witnesses ostensibly to avoid producing Jencks Act material under 18 U.S.C. § 3500,[9] calling it "the most abusive conduct by the government." It became evident during trial that government attorneys and FBI agents held several interviews with potential witnesses but no written or recorded statements were taken. Appellants argue that the government purposely failed to record the interviews because they wanted to hinder the defense and that such tactics by the prosecution should not be tolerated.

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[9]Under the Jencks Act, the government is required to produce any statement of a witness, after that witness testifies and upon motion of the defendant, that is in the possession of the United States and relates to the subject matter to which the witness testifies. "Statement," within the context of this Act, means one that is written, transcribed, or stenographically, mechanically or electronically recorded and is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement. It is undisputed that notes taken by an interviewer during an interview with the witness do not qualify as a statement under the Jencks Act. *United States v. Cuesta*, 597 F.2d 903 (5th Cir. 1979); *United States v. Scaglione*, 446 F.2d 182 (5th Cir.), *cert. denied*, 404 U.S. 941, 92 S.Ct. 284, 30 L.Ed.2d 254 (1971).

[32] No requirement has been brought to our attention that all interviews must be recorded or that interview notes must be reduced to writing and signed or otherwise approved by the witness. We cannot presume that the prosecutor acted in bad faith by failing to reduce his notes to statement form. That interviewers usually take notes rather than verbatim statements was noted by Justice Powell in his concurrence in *Goldberg v. United States,* 425 U.S. 94, 122 n. 9, 96 S.Ct. 1338, 1345 n. 9, 47 L.Ed.2d 603 (1976), wherein he stated;

> Indeed, only the foolish or exceptionally talented counsel will depend solely on his memory when preparing for the examination of a key witness. But the fact that counsel usually will take notes does not mean that the notes often will be "statements." Counsel rarely take down verbatim what witnesses say in these preparatory conferences. Consequently, prosecutors' notes may be expected to meet the requirements of [18 U.S.C. § 3500] (3)(2) very infrequently. (Citations omitted.) The notes taken will vary from cryptic "memory jogs" to full summaries of the anticipated testimony.

Appellants' claim of error on this issue is without merit.

2. Opening Statements

> Comments made during opening statements by two of the twenty-two lawyers involved in this trial have been singled out and categorized as highly prejudicial and sufficient to warrant reversal. One statement is attributed to the prosecutor who informed the jury that Noriega and his family had been relocated to a different part of the country as a result of his cooperation with

> the government and that Noriega had received approximately $34,000 from the government. Defendants contend this was an improper reference to the federal Witness Protection Program and was a suggestion to the jury that the defendants were a source of danger to Noriega.

Reference to a witness's participation in the Witness Protection Program was also at issue in the appeal after remand in *United States v. Partin,* 552 F.2d 621 (5th Cir.), *cert. denied,* 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977). In *Partin* we recognized that disclosure of such participation is a delicate matter because the jury might infer that the defendant is a threat to the witness or his family. We made clear that the prosecution may not exploit the possibility of such an inference. At the same time, however, we recognized that the defendant should be permitted to show that a witness, while in the program, received substantial benefits. Such information is relevant in the ultimate determination of the witness's credibility.

[33, 34] Anticipating that Noriega's receipt of benefits from the government would be used to impeach his credibility, the prosecutor chose to inform the jury of this in his opening statement. This information is admissible and we cannot say that the prosecutor's brief comment at the beginning of trial was an unfair exploitation.[10]

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[10]Defendants also complain about various comments made by the prosecutor during closing argument. Specifically, they point to remarks about "defense lawyer tactics," the "millionaire defense," the individual victims of the arsons, and his response to defendant Chase's argument by saying "the government's evidence has been truthful." We do not find that such comments meet the test for a new trial as again recently stated in *United States v. Lichenstein,* 610 F.2d 1272, 1281 (5th Cir.), *cert. denied,* 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 856 (1980), *quoting United States v. Blevins,* 555 F.2d 1236, 1240 (5th

[35] The remaining comment during opening statements to which defendants assign error was made by counsel for co-defendant Lostracco who commented that his client, presented as entirely innocent of the charges brought against him, was forced as a result of the indictment to sit down with a "bunch of gangsters." Defendants argue that this comment was highly prejudicial, especially in light of the surnames of most of the defendants. While we do not condone such tactics or language by any counsel in any stage of a trial, we are not persuaded that it was so prejudicial as to mandate reversals. The statement in question was made at the beginning of a lengthy trial and was not repeated. After viewing the entire record, we are not convinced that the improper statement influenced the jury at all. We find the error harmless.

4. Assertion of Fifth Amendment Privilege

[37, 38] Another argument raised by appellants was similarly rejected in *Diecidue,* a case in which Willie Noriega also testified as a government witness. In both trials, Noriega chose to exercise his Fifth Amendment right against self-incrimination. In both appeals the defendants have argued that Noriega's decision to exercise his Fifth Amendment right denied them the right of confrontation. The questions which prompted assertion of the

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Cir. 1977), *cert. denied,* 434 U.S. 1016, 98 S.Ct. 733, 54 L.Ed.2d 761 (1978): "[p]rosecutorial misconduct in the form of improper comments . . . 'must be so pronounced and persistent that it permeates the entire atmosphere of the trial.'" Furthermore, the prosecutor's comment on rebuttal that his evidence was "truthful" was even present what amounts to a bolstering argument if it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon him or his witnesses." *United States v. Dorr,* 636 F.2d 117, 120 (5th Cir. 1981).

Fifth Amendment privilege were almost identical in both proceedings. In *Diecidue* we noted that where a witness legitimately invokes the privilege, the testimony is to be struck only if the defendants' resultant inability to complete their questioning creates a substantial risk of prejudice. Generally, it is only when a witness refuses to answer questions on direct, as opposed to collateral issues, that his testimony is excised. The questions asked of Noriega were aimed at undermining his credibility. His credibility had already been the subject of intense attack during cross-examination. Therefore, as in *Diecidue,* "the responses illicited by defendants' questions would have been mere cumulative evidence of credibility." 603 F.2d at 552. The trial judge's refusal to strike the responses was not erroneous. This same rationale applies to defendants' argument relating to witness Joseph Carter's decision to invoke his Fifth Amendment privilege.[11]

5. Noriega's Competence to Testify

[39, 40] Noriega's competence to testify has been attacked by several defendants who contend that Noriega was incompetent and that his testimony was incredible as matter of law. As discussed earlier, whether a witness is competent to testify is a question of law for the trial judge. Unless an abuse of discretion is demonstrated, the trial judge's decision will not be disturbed. *United States v.*

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[11]Defendants also claim that their right of cross-examination was impaired when Noriega asserted his attorney-client privilege in response to the question whether he had asked his attorney to work with the U.S. Attorney on his behalf. This claim is frivolous. The response was given only once during extensive examination. Noriega was subsequently asked whether he had sought help from the U.S. Attorney and he answered affirmatively. No possible harm resulted from his initial assertion of the privilege.

Killian, 524 F.2d 1268 (5th Cir. 1975), *cert. denied,* 425 U.S. 935, 96 S.Ct. 1667, 48 L.Ed.2d 177 (1976). No such demonstration has been made.

6. Admissibility of Plea Agreement

Appellants object to the introduction into evidence of Noriega's plea agreement. Complaints are specifically made with reference to portions of the plea agreement that mention needed protection for Noriega and his family and his promise to testify "truthfully." Appellants concede that they cross-examine Noriega extensively about his plea agreement; nevertheless, they allege that the areas of the agreement to which they object were not covered in their cross-examination.

[41-43] The possibility that the jury would infer that the defendants were the source of danger to Noriega was eliminated by the trial judge's comments to the jury that the source of the threat was not the defendants in the instant case, but rather the defendants in another case in which Noriega had testified. As relates to the issue of the threat, it was not error to allow the jury to view the agreement between Noriega & the government, nor did the plea agreement constitute an impermissible affirmation or bolstering by the prosecutor of the credibility of a government witness. The statement in the plea agreement that Noriega promised to testify "truthfully" does not constitute error-laden vouching for the credibility of a government witness. *United States v. Arroyo-Angulo,* 580 F.2d 1137 (2d Cir.), *cert. denied,* 439 U.S. 913, 99 S.Ct. 285, 58 L.Ed.2d 260, and 439 U.S. 1005, 99 S.Ct. 618, 58 L.Ed.2d 681 (1978), and 439 U.S. 1131, 99 S.Ct. 1052, 59 L.Ed.2d 93 (1979); *United States v. Isaacs,* 493 F.2d 1124 (7th Cir. 1974). As we stated in *United States v. Rosson,* 441 F.2d 242, 244 (5th Cir. 1971): "If the defense relies upon the ex-

istence of the plea bargain to attack the credibility of the witness, it is not then entitled to preclude the jury from being apprised of additional matters relevant to the bargain so as to leave an incorrect inferenced that the witness has made a better bargain for himself . . . than in fact he has made." The court properly admitted the plea bargain agreement into evidence; appellants' arguments to the contrary are rejected.[12]

7. References to Polygraph Tests

[44,45] During cross-examination, Noriega made reference to his willingness to take a lie detector test.[13] The defendants argue that the comment was so prejudicial that a mistrial should have been granted. It is currently the law in this circuit that the results of a polygraph test are inadmissible in evidence. *United States v. Clark,* 598 F.2d 994 (5th Cir. 1979). Because the jury is not allowed to know the results of the test, appellants insist that to permit a

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[12]Appellants also contend that the document was inadmissible as hearsay. This argument misses the mark. The document was not introduced to establish the truth of the factual assertions contained therein; rather, it was merely introduced to establish the fact of its existence and contents. As such, it was not hearsay.

[13]The comment arose during the following exchange:

Q. (By defense attorney Mr. Cohen) Now, do you know, sir, that you like to do a good job as a witness in this case for the government; do you not?

A. I'm testifying to the truth, sir.

Q. Would you like to see the Government win this case?

A. It doesn't make any difference to me.

Q. You don't care; is that your testimony?

A. My testimony is I am here to testify to the truth, and I am willing to take a lie detector test if your client is.

witness to testify concerning his willingness to take the test constitutes improper bolstering. Although we agree that Noriega's response to the question was improper, we do not agree that it was prejudicial to the point of measurably affecting the jury's verdicts. The trial judge not only cautioned the jury twice to disregard Noriega's comment, he also told them why such an instruction was being given. He explained that polygraph tests have not yet achieved sufficient scientific reliability to be admissible in evidence. If there was any prejudice to the defendants, such prejudice was cured by the careful manner in which the trial judge handled the situation[14]

8. Comment on Defendants' Failure to Testify

Appellants suggest that an exchange that occurred after Noriega's response as set forth in footnote 13, was grounds for a mistrial. They claim that the prosecutor made an improper reference to the decision of some the defendants not to testify. That reference ostensibly occurred during the following exchange:

THE COURT: Well, I will instruct the jury to altogether disregard that last part of the witness's answer.

MR. COHEN: Judge, I would like to be heard on that outside the presence of the jury. I think—

THE COURT: Well, you may.

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[14]There was another reference made to the polygraph test by government witness James Earl Wright. Under cross-examination concerning a pending state charge against him, Wright said that he really was not concerned about the charges because he knew he could beat those charges by taking a polygraph test. The reference had nothing to do with the charges that were the subject of the trial. No prejudice occurred as a result of than fleeting comment.

MR. COHEN: I think that my client will be more than willing to enter that sort of stipulation.

MR. HOGUE: (The Prosecutor) Objection to counsel testifying. If he wants to take the stand he may.

At this point the judge excused the jury and held a discussion with counsel.

[46] The comment by the prosecutor that "If he wants to take the stand he may," immediately followed the prosecutor's objection to defense counsel testifying. It strains credulity to believe that the prosecutor was referring to a defendant. To accept the appellants' argument we would have to view that statement out of the context in which it was said, a clearly impermissible approach. *See United States v. Austin,* 585 F.2d 1271 (5th Cir. 1978). Furthermore, the statement was not of "such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. White,* 444 F.2d 1274, 1278 (5th Cir.), *cert. denied,* 404 U.S. 949, 92 S.Ct. 300, 30 L.Ed.2d 266 (1971). It was not a reversible error reference to the defendants' election not to testify.

9. Miscellaneous Improper Comments

[47, 48] Various responses given by witnesses during the trial are challenged as being so prejudicial that they denied the defendants a fair trial. Our review of the record leads to the conclusion that these responses did not result in prejudice to the defendants. In reaching this conclusion we follow the guidelines expressed in *United States v. Hyde,* 448 F.2d 815, 847 (5th Cir. 1971), *cert. denied,* 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972): "Allegedly improper statements should not be viewed in the abstract. The question is what impact they had in the con-

text of the particular trial in terms of their relevance and the quantity of untainted evidence in the case." As we noted earlier, this trial lasted over three months and the record includes more than 11,000 pages of testimony. We cannot say that the four or five responses complained of by the defendants measureably affected the jury in any way. This complaint is likewise without merit.

10. Exclusion of Hearsay Testimony

Lazzara argues that certain hearsay testimony was wrongfully stricken from the record, resulting in prejudicial and reversible error. We do not agree. The hearsay testimony was elicited from witness Ruth McElroy the mother of hiram McElroy who was working for Lazzara at a Miami laundromat when it burned. Noriega testified that, as part of the scheme, he took Hiram McElroy to the bus station in Miami and then returned to the laundromat to set the fire. Noriega admitted responsibility for the fire, saying he set it at Lazzara's request. Hiram McElroy, on the other hand, allegedly told his mother that he was sleeping in the laundromat when the fire broke out and that earlier he had been cooking on a hot plate and may have left it on. McElroy died prior to trial and Lazzara tried to get his statement into evidence as an exception to the hearsay rule under Rule 804(b)(3), Fed.R.Evid. The trial judge ruled the testimony was inadmissible hearsay. Rule 804 provides in part:

> (a) Definition of unavailability.— 'Unavailability as a witness' includes situations in which the declarant—
>
> * * * * * *
>
> (4) is unable to be present or to testify . . . because of death . . . .

> (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * * *
>
> (3) Statement against interest.—A statement which . . . at the time of its making . . . so far tended to subject him to civil . . . so far tended to subject him to civil . . . liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

In relying on this hearsay exception rule, Lazzara argues that McElroy subjected himself to civil liability by admitting possible fault in the laundromat fire.

[49] We find no error in the judge's decision to strike the hearsay testimony. As reflected by the specific language used in Rule 804(b)(3), the statement against interest must be almost a direct, outright statement that the person was legally at fault. McElroy's statement simply indicated that he might have been the one who caused the fire. There was testimony from fire inspectors that a hot plate was involved but that the fire was the result of arson. We agree with the trial judge that McElroy's statement was not a declaration sufficiently subjecting him to civil liability to invoke the quoted exception to the hearsay rule.

11. Sequestration Breaks

[50] Appellants complain that once the trial judge chose to sequester the jury, it was error for him then to allow breaks in that sequestration by permitting the jurors to visit with family members without repeatedly reinstructing them about avoiding outside influence. Before a rever-

sal will lie on this ground, appellants "must demonstrate a substantial likelihood that some prejudice did result." *United States v. Harris,* 458 F.2d 670, 675 (5th Cir.), *cert. denied,* 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972).

[51, 52] The trial judge has the discretion to decide whether to disperse the jury. *Tyler v. United States,* 397 F.2d 565 (5th Cir. 1968), *cert. denied,* 394 U.S. 917, 89 S.Ct. 1187, 22 L.Ed.2d 450 (1969). In the cases dealing with breaks in sequestration, emphasis is usually placed upon the fact that the judge reminded the jury to avoid outside influence. *United States v. Banks,* 485 F.2d 545 (5th Cir. 1973), *cert. denied,* 416 U.S. 987, 94 S.Ct. 2391, 40 L.Ed.2d 764 (1974); *Tyler, supra.* In the instant case, while the jury was not reinstructed prior to every break in sequestration, they were constantly reminded during the course of the trial (at which time they were not under order of sequestration) not to discuss the case with anyone and to avoid reading any publicity concerning the trial. While sequestered, and pursuant to the judge's orders, the U.S. Marshals (in whom custody of jurors is entrusted) repeatedly reminded the jurors to refrain from discussing the case. Newspapers brought in by family members were edited before being given to the jurors. There can be no doubt that the jurors were fully aware of their responsibilities.

The jurors deliberated for 3 1/2 weeks; their sequestration spanned three weekends. We see no error in the judge allowing jurors to visit with their families at the hotel on Sundays. In light of the precautions taken by the judge during the trial, and through the marshals during deliberations, we see no basis for the contention that the defendants were prejudiced by the judge's failure to reinstruct the jurors personally of to voir dire each one concerning possible exposure after the visitation periods. The

allowance of family visits was a reasonable, humane and understanding act by the trial judge. No reversible error lurks within.

12. Miscellany

Finally, Russello urges three other assignments of error: a biased grand jury, exclusion of evidence about Noriega's character and an improper jury charge.

a. Grand Jury Bias

Russello contends he was deprived of his right to an unbiased grand jury because of two incidents. First, he complains that the prosecutor should not have called him to testify before the grand jury because after he received his subpoena, his attorney advised the prosecutor that Russello intended to exercise his Fifth Amendment privilege. Russello was nevertheless called as a witness; he exercised his Fifth Amendment privilege.

[53, 54] It has long been recognized that "[c]itizens generally are not constitutionally immune from grand jury subpoenas." *Branzburg v. Hayes,* 408 U.S. 665, 682, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (1972). Our courts have repeatedly reaffirmed "the historically grounded obligation of every person to appear and give his evidence before the Grand Jury." *United States v. Dionisio,* 410 U.S. 1, 9, 93 S.Ct. 764, 769, 35 L.Ed.2d 67 (1973). "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair v. United States,* 250 U.S. 273, 281, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). Russello's claim that he should not have been called after revealing his intention to remain silent is without merit.

[55] Russello also alleges that after his appearance before the grand jury, he learned that the prosecutor, in the presence of the grand jury, told Farina that he, Farina, was a disgrace for exercising his right to remain silent. Russello argues that this was also a reflection on his right to remain silent. He points to no specifics to show that the jury imputed to him the prosecutor's comment and attitude toward Farina. We do not agree that the prosecutor's comment about Farina was an attack on Russello's character. Russello was not denied the right to an unbiased grand jury.

b. Exclusion of Evidence

The thrust of Russello's second contention is that he and his family were threatened by Noriega, that his building had been burned without his knowledge and that he had paid Noriega only because Noriega extorted the money. To support the argument that Noriega was a violent man, and to rebut inferences from government testimony to the contrary, Russello called a witness who was to testify about shooting Noriega after Noriega threatened the witness's employer. The trial judge ruled the evidence inadmissible under Fed.R.Evid. 608(b).

Russello relies on *United States v. Opager,* 589 F.2d 799 (5th Cir. 1979), where the trial judge excluded certain business records which would have shown that one of the government's key witnesses was lying about a fact material to Opager's defense. In response to Opager's defense of entrapment, the government witness testified, in an effort to show the defendant's predisposition to commit the crime, that he had worked with the defendant and had seen her engage in the same criminal conduct. The business records Opager sought to introduce would have

established that she and the witness had not worked together at the pertinent time. In reversing the conviction, we emphasized that the evidence did not merely go to the witness's character for truthfulness, but rather was relevant specifically to contradict the witness's testimony as to a *material issue. Opager* is distinguishable from the situation in the case at bar.

[56] Although Russello relied on the defense that he acted in response to threats from Noriega, Noriega's threats against the employer of the witness called by Russello did not relate directly to Russello as the excluded testimony in *Opager* related directly to the defendant. The material issue here was not whether Noriega had threatened the witness's employer, but whether Noriega had threatened Russello. The evidence was not relevant to a "material issue" within the context of *Opager*. We find no error in the exclusion of this testimony.

c. Jury Instruction

[57] Russello contends that the trial judge did not correctly charge the jury as to the evidence required for a mail fraud conviction. The challenged portion of the jury charge states: "A statement or representation may also be 'false' or 'fraudulent' when it constitutes a half-truth, or effectively conceals a material fact, with intent to defraud." Russello relies on *United States v. Meadows*, 598 F.2d 984 (5th Cir. 1979), in which we held that a similar instruction created reversible error. There is one dispositive difference between the charge in *Meadows* and the charge *sub judice*. The trial judge in *Meadows* stated that "under the law fraud may result from statements of half-truths or the concealment of material facts." *Id.* at 987. The statement that created reversible error resulted

from the failure by the court to remind the jury of the intent required to convict. In the instant case the trial judge added four critical words to the instruction that had been found wanting in *Meadows;* the instruction complained of here concludes with the words "with intent to defraud." That phrase takes this instruction out of the *Meadows* category and compels our rejection of this claim.

G. Sufficiency of the Evidence

[58] Most of the appellants challenge the sufficiency of the evidence to support their convictions on both the RICO and the mail fraud charges. We recently reiterated the standard for review of such a challenge in *United States v. Marx,* 635 F.2d 436, 438 (5th Cir. 1981):

> In reviewing the sufficiency of the evidence, we must view all the evidence, direct and circumstantial, in the light most favorable to the government, and must accept all reasonable inferences and credibility choices that tend to support the jury's verdict. (Citations omitted.) The standard of review is whether a jury could reasonably find that the evidence was inconsistent with every reasonable hypothesis of innocence or, put another way, whether a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt.

With respect to the conspiracy convictions, the test on appeal is whether there is substantial evidence to support the verdicts. *Id.; United States v. Malatesta,* 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied,* 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). We shall review the RICO convictions separate from the mail fraud convictions

because of the obvious difference in the evidence required to sustain convictions.

1. RICO Convictions

[59] Five necessary elements comprise a substantive RICO charge. The government must prove (1) the existence of the enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that he participated in the conduct of the affairs of the enterprise; and (5) that he participated through a pattern of racketeering activity.

In reviewing the RICO convictions we bear in mind the broad reach of the RICO statute, as articulated in *Elliott*, 571 F.2d at 903:

> The substantive proscriptions of the RICO statute apply to insiders *and outsiders* – those merely "associated with" an enterprise – who participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity. (Citations omitted.) Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise. (Emphasis in original.)

Even with a tightly woven net however,a fish, or whatever size, cannot be trapped unless he is "employed by or Associated with" the enterprise. In other words, the fish must first be swimming in the stream where the net has been placed before we reach the question of size. The indications from *Elliott* that only minimal association is necessary have caused fire lines to be drawn in determining those who are guilty of violating RICO and those who are

not. A defendant must know *something* about his co-defendants' related activities which make up the enterprise, but it is not necessary that he be aware of *all racketeering activities of each of his partners in the enterprise. Diecidue.*

[60, 61] To convict on a charge of conspiracy, the government must prove that the defendant had knowledge of the conspiracy and that he intended to join in the objectives of the conspiracy. The degree of criminal intent necessary for participation in a conspiracy must be *at least* equal to that require for the substantive offense itself. *Malatesta.* More specifically, to convict for conspiracy to violate RICO the government must prove that the person objectively manifested, through words or actions, an agreement to participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes. *Bright* and *Elliott.*

2. Mail Fraud Convictions

[62, 63] The elements of the offense of mail fraud have been discussed in numerous decisions in this circuit, including the concise distillation in *United States v. Green,* 494 F.2d 820, 823-24 (5th Cir.), *cert. denied,* 419 U.S. 1004, 195 S.Ct. 325, 42 L.Ed.2d 280 (1975):

> The two basic elements of a mail fraud scheme are (1) the scheme to defraud, and (2) causing a mailing for the purpose of executing the scheme. While the mailing must, as the statute requires, be "for the purpose of executing the scheme . . . [i]t is not necessary that the scheme contemplate the use of the mails as an essential element. Indeed, it is sufficient if the mailing that is caused is "a part of the execution of the fraud," or is "in-

> cident to an essential part of the scheme." One "causes" the mails to be used when one "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, such use can reasonably be foreseen, even though not actually intended." (Citations omitted.)

Thus, it is clear that if there is sufficient evidence to connect a defendant to the fraudulent scheme involving use of the mails, it is not necessary that he do any of the mailing. Co-schemers are jointly responsible for each other's acts when the acts are within the general scope and in furtherance of the scheme. *United States v. Rodgers,* 624 F.2d 1303 (5th Cir. 1980).

With these elements and standards in mind, we examine the claims of the various defendants that the evidence was insufficient to justify their convictions.

THE ARSONISTS

Frank Scionti:

[64] Scionti was found guilty on both RICO counts (Counts 1 and 2) and on four counts or mail fraud (Counts 3, 4, 5 and 6). Counts 3 and 4 dealt with the fire at 1811 Taliaferro Street. Counts 5 and 6 pertained to the laundromat fire in Miami. Scionti does not specifically assert that the evidence was insufficient to support his convictions on the mail fraud counts. The jury's verdict is therefore not challenged on those four counts. Furthermore, he concedes that the evidence was sufficient to support his convictions if the testimony of Noriega is to be accepted. His argument that Noriega was incompetent as a witness and because of his mental condition could not be

considered credible as a matter of law, has been discussed and decided adversely to him. *See United States v. Parker,* 586 F.2d 422 (5th Cir. 1978), *cert. denied,* 441 U.S. 962, 99 S.Ct. 2408, 60 L.Ed.2d 1067 (1979); *Jackson, supra.* We affirm Scionti's convictions.

Paul Guarino:

[65, 66] Guarino was convicted on both RICO counts and on fifteen counts of mail fraud. He does not specifically challenge the sufficiency of the evidence on any count. In his brief, he posits the "Statement of Issues," which does not question the sufficiency of the evidence, and then adopts the arguments advanced by the co-defendants in support of those issues and any other issues they raised that may apply to him. Although this is not an appropriate challenge to the adequacy of the evidence, we have made a general review of the evidence against Guarino and find it sufficient to convict him on the RICO counts and thirteen of the mail fraud counts. As to Counts 17 and 18, for the reasons discussed *infra,* with respect to defendant Lostracco, we reverse Guarino's convictions. The evidence does not establish that the charged mail frauds occurred.

THE FINANCIERS

Berton B. Chase:

Chase is the only defendant charged solely with conspiracy. He argues that the evidence was sufficient to support his conviction because it showed an agreement to commit only one predicate act rather than the requisite "pattern of racketeering activity." We agree.

Chase was indicted because of his involvement in the arson of a warehouse located on 12th Street in Tampa. Mar-

tino had a ninety day option on the building. Noriega and Guarino acquired the option from Martino and upon exercising it, put title in the name of Alex Fekete, an unindicted co-conspirator who testified as a government witness. As part of the purchase arrangements, Fekete gave the seller a first mortgage covering the credit portion. Insurance coverage was to be transferred to Fekete and additional coverage was obtained. When more money was needed for building repairs, Chase was approached. He arranged for a loan of $12,000 by a client, secured by a second mortgage on the property, and received $6,000 as a "kickback." The mortgage was to be paid with insurance proceeds expected from the planned arson.

Fekete was to maintain the insurance coverages, however, he became delinquent in paying the premiums. The seller paid the premiums on the original policy and threatened to foreclose on his mortgage unless he was reimbursed for the money advanced. In order to prevent the foreclosure, and to protect his client's interest as holder of the second mortgage, Chase reimbursed the seller.

An attempt was later made to transfer title from Fekete to the second mortgage holder. Before the transfer was completed, and pursuant to Chase's instructions, Noriega burned the warehouse. Because Fekete had failed to pay the premiums on the additional insurance he had secured, only the insurance the seller had purchased was collected.

The evidence appears sufficient to convict Chase of arson or of conspiring to commit that offense, but those are not the charges for which he stood trial. He was charged and convicted of conspiring to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity. As pointed out in *Elliott,* 571 F.2d at

902, "the object of a RICO conspiracy is to violate a substantive RICO provision . . . and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity." One who does not agree to do that vital element – participate in the enterprise through the commission of at least two predicate acts – cannot be convicted on a RICO conspiracy charge. In effect there are two agreements contained in a RICO conspiracy charge: an agreement to participate and an agreement to commit at least two proscribed acts.

A review of the evidence reflects that Chase agreed to arrange a loan secured by mortgage on a building, with the knowledge the building would be burned and the mortgage would be paid with a portion of the insurance proceeds. He received a "kickback" for his efforts. According to Noriega, Chase set the time for the fire. Chase also acted to protect Fekete's ownership of the building by reimbursing the seller's insurance premiums in order to avoid foreclosure on the first mortgage.

[67] The only agreement which may be classified as an agreement to commit a predicate crime as defined in § 1961 is Chase's agreement to commit arson. Chase was not charged with mail fraud. There was no mail fraud committed in connection with that arson because the only insurance claim submitted was that of the former owner/mortgagee on a legitimate policy. The only predicate act enumerated in the indictment implicating Chase involves the arson of the warehouse.

Absent a charge and proof of an agreement to comit two of the specified predicate crimes, a defendant cannot be convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity. Chase's conviction for conspiring to violate RICO is invalidly based and must be reversed.

Sam Martino:

Martino does not challenge the sufficiency of the evidence on his convictions of the mail fraud counts (Counts 14, 15 and 16). With respect to the RICO convictions. Martino argues that as a mere customer of the services offered by the enterprise, his conduct did not fall within the proscription of RICO. The evidence establishes that Martino was more than a customer of the enterprise, he was a recurring figure in the activities of the enterprise.[15] As a real estate agent and mortgage broker, Martino played a multifaceted role. The evidence shows that he assisted in the acquisition of three properties in Tampa that were considered suitable for burning.

The property located at 2020 E. Columbus was purchased by Noriega through the assistance of Martino. The prior owner had been making mortgage payments to Martino's Ybor Loan Company but sold the house because of tax problems and because it became apparent that costly repairs would have to be made to avoid condemnation by housing inspectors. The first mortgage on the house was assumed by Noriega and an existing $4,000 insurance policy was transferred to him. Noriega doubled the existing coverage before acquiring two additional policies, each affording $15,000 protection. Carter was instrumen-

[15]Martino points to his acquittal on several counts as support for his argument that his limited contacts with the enterprise, evidenced by his conviction on charges relating to only one fire, did not amount to participating in the conduct of the affairs of the enterprise. While the jury may not have found that the government proved Martino's guilt in the mail fraud scheme, that does not necessarily mean that the jury did not believe that Martino was somehow involved. The evidence of his involvement, while not sufficient to convict for mail fraud, would support the conclusion that he was associated with the enterprise and a participant in the conduct of its affairs.

tal in obtaining the additional insurance. Four months after the house was acquired, it was burned by Noriega and Guarino and insurance proceeds were collected on the policies[16] Martino had ordered the cancellation of the $8,000 policy transferred from the prior owner although the order did not go into effect until after the fire. The mortgages held by Martino's loan company were paid with insurance proceeds.

With the help of Martino, Noriega was able to purchase additional substandard property located at 3006 N. Nebraska.[17] Martino initially arranged a loan to Noriega for $7,000, taking a "kickback" of $1,500. Later, when money was needed for repair work, Martino arranged a $1,500 loan secured by a second mortgage. Noriega then sold the property to Macaluso, paying the mortgage with the proceeds of the sale.

Martino also had a connection with the warehouse discussed earlier. He initially leased the property for one year and had a ninety day option. His original plans were to over-insure the building and then burn it. These plans changed and he sold his interest in the property to Noriega and Guarino and assigned the option.

[68] The evidence reflects more than Martino's mere association with the enterprise; it shows that he played an important role by assisting in the acquisition of properties suitable for burning. His participation in the conduct of the affairs of the enterprise is further evidenced by his con-

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[16]Martino was convicted on three mail fraud counts relating to the fire at this location.

[17]Martino was acquitted on the mail fraud counts relating to this property.

viction on the three counts of mail fraud. We affirm his conviction on Count 2. The evidence is sufficient to sustain the conviction on Count 1. The requisite element of agreement is apparent from his actions.

THE MISGUIDED ENTREPRENEURS

Amalia Morgado:

[69, 70] Morgado does more than claim that the evidence is insufficient to support her convictions on Counts 21 and 22; she argues that there is *no* evidence that she placed or caused to be placed, in the United States mail, the Proof of Loss which is the subject of those counts. After reviewing the record, we agree that there was no evidence offered showing that Mrs. Morgado personally mailed the Proof of Loss. Such evidence is not required, however, to support the convictions on the mail fraud counts. "It is well settled in this circuit that so long as one participant in a fraudulent scheme causes a use of the mails in execution of the fraud, all other knowing participants in the scheme are legally liable, for that use of the mails." *United States v. Toney,* 598 F.2d 1349, 1355 (5th Cir. 1979), *cert. denied,* 444 U.S. 1033, 100 S.Ct. 706, 62 L.Ed. 670 (1980). The evidence shows that Morgado was involved with several other defendants in the scheme to defraud the insurer through the arson of the Vasconia Street property. The mail fraud convictions are supported by the requisite evidence.

[71] The evidence, viewed through the mandated appellate prism, shows that Morgado served on the "marketing" staff of the enterprise as a connection between persons wanting to burn their property and the arsonists. She was instrumental in arranging for Noriega to burn the Vasconia Street property owned by co-defendant

John Alan Holt. She made the initial contacts and paid Noriega for his services with checks written on her personal account. Her participation in at least the initial stages of the fraudulent scheme is apparent. Once she became involved in the scheme, she had to do some affirmative act of withdrawal before she may disclaim responsibility for the subsequent acts of her co-schemers. *United States v. Bradsby,* 628 F.2d 901 (5th Cir. 1980). There is no evidence of any affirmative action on the part of Morgado to withdraw from the scheme.

[72] Having concluded that the evidence was sufficient to convict Morgado on the two counts of mail fraud, we examine her convictions on the RICO substantive and conspiracy counts. Morgado was involved in arson and mail fraud, both of which are statutorily designated predicate crimes and base the charge that she engaged in a "pattern of racketeering activity." The final inquiry is whether Morgado's association with the enterprise has been established. The evidence implicated Morgado in another Tampa arson that was not included in the mail fraud counts. Again acting as the "marketing" person for the enterprise, Morgado arranged for her sister to buy substandard property which later was burned. Her sister recovered under a fire insurance policy after Morgado acted as notary on the Proof of Loss. Morgado was associated with the enterprise; she worked at furthering the business in which the enterprise was engaged. Convinced that the evidence sufficiently establishes all of the elements required for a RICO substantive offense, we affirm Morgado's conviction on Count 2. The evidence also establishes the required element of agreement, accordingly, Morgado's conviction on Count 1 is also affirmed.

Joseph Macaluso:

Macaluso was convicted on both RICO counts and on five counts of mail fraud. His challenges to the mail fraud convictions stem from a variance between the indictment and the proof adduced at trial and point to an alleged inconsistency in the verdicts with respect to other defendants also charged in the counts.

[73, 74] Counts 11, 12 and 13 arose out of the arson and subsequent collection of insurance proceeds for property located on N. Nebraska. The indictment charged Macaluso, Morgado, Martino, Carter, Guarino and Noriega. The jury acquitted Martino, Morgado and Guarino on these counts. Noriega and Carter pled guilty. Macaluso argues that the verdicts necessarily indicate that the jury rejected Noriega and Carter as credible witnesses and, therefore, his conviction must be reversed because it is inconsistent with the verdicts on the others. We do not agree. A similar argument was rejected in *United States v. Dubea,* 612 F.2d 950 (5th Cir. 1980), and in *United States v. Michel,* 588 F.2d 986 (5th Cir.), *cert. denied,* 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979). Our inquiry on appeal is limited to determining whether the evidence in sufficient to support the counts on which the appellant was convicted; we do not look at what the jury did with other counts or other defendants. Because the jury may have chosen not to believe Carter and Noriega with respect to the other defendants does not mean that they had to find those witnesses not credible as to their testimony concerning Macaluso. Reviewing the evidence against Macaluso, we find that there was sufficient evidence to support his convictions on Counts 11, 12 and 13. Those convictions are affirmed.

Counts 7 and 8 charge mail fraud with respect to the ar-

son and subsequent collection of insurance proceeds for property located at the corner of 10th Street and 12th Avenue. Macaluso challenges his conviction specifically on Count 8 because, while the indictment charged that the object of the Count 8 mail fraud was mailed from New York to Jacksonville, the evidence showed that the mailing occurred between Jacksonville and Tampa. This inconsistency, it is argued, prejudiced Macaluso's substantial rights to the extent that a reversal is warranted.

[75, 76] We find a variance between the indictment and the evidence as to the specific mailing locations involved in Count 8. We do not agree, however, that this variance affected Macaluso's substantial rights. The addresses of the sender and addressee were not the only information set forth in Count 8. The indictment also set out the numbers of the drafts that were sent through the mail, the names of the payees, and the amounts involved. All of this information was correct. The variance in *United States v. Cook,* 586 F.2d 572 (5th Cir. 1978), *cert. denied,* 442 U.S. 909, 99 S.Ct. 2821, 61 L.Ed.2d 274 (1979), where the indictment charged a mailing to the United States Air Force and the evidence showed the mailing went to the General Services Administration, was considered a "technical variance . . . best relegated to the 'immaterial' category." *Id.* at 575. Considering the totality of the circumstances at bar, this expression from *Cook* applies. The variance Macaluso notes is not reversible error. Macaluso does not point to any specifics with regard to the claim of insufficient evidence as to Count 7. Our general review discloses the evidence is sufficient. The convictions on Counts 7 and 8 are affirmed.

[77] With regard to his RICO convictions, Macaluso argues that if he was involved in a conspiracy, it was for the limited purpose of aiding in the arson. Our review of

the evidence results in a contrary conclusion. The arsons in which Macaluso was involved were part of the main business of the enterprise. He acted as the go-between or contact person for the arson of the 10th Street and 12th Avenue property, and he participated in its burning. He was also the owner of the N. Nebraska property that was burned. Several members of the enterprise were involved in those incidents. We are persuaded that the evidence establishes Macaluso's active involvement in the affairs of the enterprise.

Macaluso's final contention is that the evidence did not show he intended to further the affairs of the enterprise.

This argument is without merit. By his active involvement Macaluso did further the enterprise's affairs. We affirm Macaluso's convictions on Counts 1 and 2.

John Lostracco:

Lostracco was convicted on RICO Counts 1 and 2 and mail fraud Counts 17 and 18. He challenges the sufficiency of the evidence. We agree.

[78] An arson committed at a 27th Street address provides the basis for the mail fraud charges. The property was owned by Lostracco's brother-in-law and sister-in-law, Mr. and Mrs. Joseph Bartolotti. Lostracco acted as the real estate agent for the proposed sale from the Bartolottis to Noriega and Guarino. Title to the property was to be put in the name of Jimmy Traina, who was to share the fire insurance proceeds with Noriega and Guarino. The Bartolottis were aware only of Traina's interest. Although a contract to sell was executed, the plans went awry when Noriega burned the house before title actually passed to Traina. At the time of the arson the Bartolottis still owned the property and were the insureds under an in-

surance policy. There is no evidence that the Bartolottis were involved in the arson or had any knowledge of the plan to burn the building for the insurance.

After learning that the property had been burned and that they were still the owners, the Bartolottis submitted their insurance claim. This claim was not fraudulent; their policy was valid and they were not aware of the arson. Counts 17 and 18 charge Lostracco with mail fraud in connection with the sworn statement in the Bartolotti Proof of Loss and the insurer's draft issued to the Bartolottis. There is no evidence that the Bartolottis submitted a claim under their policy intending to deliver over or share the insurance payment with any member of the enterprise. To the contrary, the evidence reflects that Noriega, Guarino and Traina received the insurance proceeds only after threatening and pressuring the Bartolottis.

[79] There is no evidence of Lostracco's involvement in a mail fraud scheme centered on the Bartolottis' 27th Street property because no mail fraud occurred. If the sale had been consummated as planned, and if Traina had collected on the fire policy, a mail fraud would have been perpetrated. Under those circumstances, if Traina had not been able to collect for some reason, the government still could have proven mail fraud because success of the scheme is not required for a conviction. The government takes the position that the facts present an unsuccessful mail fraud scheme and, therefore, Lostracco's convictions must stand. The evidence does not support that conclusion. The Bartolotti claim and the payment to them cannot be transformed into mail fraud and imputed to the enterprise. The previously discussed rule that co-schemers are jointly responsible does not apply because there is no evidence that the Bartolottis were co-schemers. Lostracco's convictions on Counts 17 and 18 must be reversed.

[80] In order to be convicted on a RICO substantive charge under § 1962(c), there must be evidence that the defendant participated in the conduct of the enterprise's affairs through a pattern of racketeering activity which requires the commission of two predicate crimes. The evidence supports findings that Lostracco participated in the arson and in discussions which could lead to mail fraud. Section 1961, however, specified only completed offenses as predicate acts; neither attempts nor conspiracies (perhaps other than conspiracies involving drugs) are included. The evidence establishes that Lostracco committed only one predicate act. Accordingly, his conviction on Count 2 must be reversed.

Having found that Lostracco is not guilty of the RICO substantive offense because he did not commit two predicate acts, we must now inquire whether the indictment charge and the evidence proved that the *agreed* to commit two recognized predicate acts. The two acts of racketeering charged are the arson at the 27th Street address and the alleged mail fraud resulting from the insurance claim by the Bartolottis.

[81] There was no mail fraud committed when the Bartolottis made their fire loss claim. Consequently, Lostracco's involvement in that claim could not constitute an agreement to commit a criminal act. We are cognizant that the evidence reflects a plan by Lostracco and others to commit arson and mail fraud. The mail fraud which was a part of that plan, however, is not the mail fraud charged in the indictment.

A RICO conspiracy conviction requires that the indictment charge and the proof establish the two predicate crimes agreed to. The evidence does not support the charged mail fraud and Lostracco's conviction on Count 1 must be reversed.

THE DISSATISFIED OWNERS

John Alan Holt:

Holt's challenge to the sufficiency of the evidence supporting his mail fraud convictions is based on the government's alleged failure to prove that venue was proper as to Count 21 and the asserted lack of evidence that Holt mailed or caused to be mailed the items named in Counts 21 and 22.

[82, 83] Venue for a mail fraud conviction is proper in any of the districts from, through, or into which the item of mail moved. 18 U.S.C. § 3237(a). The government had to show that the Proof of Loss for Holt's insurance claim was either mailed from the Middle District of Florida, mailed to the Middle District of Florida, or that it passed through the Middle District of Florida, as it traveled to its destination. The burden of proof to establish venue is not as onerous as the burden required for proof of an element of a crime. Venue need only be proven by a preponderance of the evidence. As long as there is circumstantial evidence in the record supporting the inference that the crime was committed in the district where the trial is held, direct evidence is not required. *United States v. White,* 611 F.2d 531 (5th Cir. 1980); *United States v. Turner,* 586 F.2d 395 (5th Cir. 1978), *cert. denied,* 440 U.S. 926, 99 S.Ct. 1258, 59 L.Ed.2d 480 (1979).

[84] The subject of the mail fraud charged in Count 21 is a sworn Proof of Loss signed by Holt which was mailed by the office of the Safeco Insurance Company in Tampa to the Safeco Insurance Company in Atlanta. Holt argues that there is no evidence showing where Safeco in Tampa had mailed the item or where Safeco in Atlanta had received it. This argument is not supported by the record. Dale

Jermyn, the former claims manager for the Tampa Safeco office, testified that after the original Proof of Loss was received in his office, it was customary to sent it by mail to the Atlanta division office. He further testified that, with respect to the specific Proof of Loss at issue here, the original had been mailed to the Atlanta office by Mr. Parker, the Tampa office adjuster. Holt underscores that Jermyn did not specifically testify that the item was mailed from the Tampa post office. We cannot accept Holt's argument that the jury could just as easily have inferred that Mr. Parker chose to go outside of Tampa and the judicial district, to mail the document. Nor can we accept the suggestion that the document mailed to the Atlanta office was received somewhere other than Atlanta. Under the facts reflected in this record, the most obvious and compelling inference is that the item was mailed in Tampa and received in Atlanta. Venue properly lies in the Middle District of Florida.

[85, 86] Holt's second argument is based on the absence of testimony pointing to his mailing or causing to be mailed the Proofs of Loss. This argument founders on the rubrics expressed in our prior decisions which speak to the evidence required to sustain mail fraud convictions. It was not necessary to prove that Holt actually did the mailing, "he need only have had a reasonable basis to forsee that his actions would result in the use of the mails." *United States v. Georgalis*, 631 F.2d 1199, 1206 (5th Cir. 1980); *Toney, supra; Banister v. United States*, 379 F.2d 750 (5th Cir. 1967). Though one lacks the actual intent to use the mails, one "causes" the mails to be used when the acts with the knowledge that the mails will be used in the ordinary course of business. *Pereira v. United States*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954).

[87] The facts surrounding the mail fraud counts

against Holt are very similar to those which were before the court in *Banister, supra.* Holt argues that Count 21 charges the sending by one insurance agent of a Proof of Loss to another insurance agent, a mailing with which he had absolutely nothing to do. As to Count 22, he argues that there is no evidence that the attorney who claimed to be representing Holt in sending the Proof of Loss to the insurance agent was acting at Holt's direction. This argument was unsuccessfully urged in *Banister,* where we found that the jury could have reasonably inferred that when the defendants dealt with a local agent of an insurance company, they reasonably should have contemplated that the mails would be used when the local agent dealt with the home company. Likewise, the jury in this case reasonably could have inferred that in filing a claim with his local insurer, Holt should have known that the mails would be used in the processing of his claim. We find sufficient evidence to support Holt's convictions on the mail fraud counts.

[88] Holt's objections to his RICO convictions focus on his level of involvement and the number of people with whom he has involved. He does not deny that an enterprise engaged in the busines of burning property with the intent to defraud insurance companies existed; he argues, rather, that the evidence showed his involvement was limited to an association with Noriega, not an association with the overall enterprise. The evidence does not support this argument. Holt's involvement extended beyond an association with Noriega and included contacts with at least Morgado. There was sufficient evidence for the jury to infer that Holt was associated with the enterprise. Once established that he was connected with the enterprise, his participation in the conduct of its affairs was proved by evidence of the arson and the mail frauds. Holt's convic-

tion on Count 2, therefore, is affirmed. Affirmance of the Count 1 conviction for agreeing to participate necessarily follows for the reasons and on the authorities previously discussed.

Rolando Gonzales Rodriguez:

Rodriguez stands convicted on four counts: the two RICO counts and Counts 7 and 8 of the mail fraud charged. He adopts by reference the arguments made by his co-defendants with respect to Counts 1, 2 and 7; with respect to Count 8, he relies on the variance argument presented by Macaluso. We have rejected the variance argument and Rodriguez's conviction on Count 8 is affirmed.

[89] Rodriguez's convictions arose out of the arson of property he owned on the corner of 10th Street and 12th Avenue. Macaluso put Rodriguez in touch with Noriega. After agreeing to undertake the "torching," Noriega enlisted the help of Guarino and Macaluso. The fire was only partially successful, but with Carter's help in adjusting the claim, $500 was received from the insurer. Rodriguez does to point to any specifics with respect to his claim of insufficient evidence to support his convictions on Counts 1, 2 and 7. After making a general review of the evidence, we are persuaded that there is sufficient evidence to support the jury's conclusion that Rodriguez was guilty of the mail fraud charged in Count 17, as well as his guilt of the RICO charges in Count 1 and 2. His convictions are affirmed.

Joseph Lazzara:

Lazzara was convicted on Counts 1, 2, 5 and 6. The charges arose out of the burning of a Miami laundromat

owned by Lazzara. We find the evidence sufficient to support the four convictions and affirm.

[90] With respect to the mail fraud convictions, Lazzara argues that because no one in the enterprise did the mailing or assisted him in processing his claim, the mailings were not affairs of the enterprise and therefore he should not have been convicted. The acts of mail fraud for which he was convicted directly followed the arson that was committed by the enterprise; the fraudulent collection on the insurance policy was part of the scheme. It was not necessary that members of the enterprise be involved in the actual filing of the claim. Mail fraud is listed as one of the designated predicate crimes; the mail frauds charged herein were clearly related to the affairs of the enterprise. *See Bright, supra.* Lazzara's argument to the contrary is infirm.

[91] Lazzara's challenge to the sufficiency of the evidence to support his convictions for RICO violations is based on an erroneous interpretation of what is required for a RICO conviction. He argues that the phrase "to conduct or participate in the conduct" of the affairs of an enterprise means that the person must be involved in the control or management of the enterprise. This contention has been proffered and rejected. *See Tucker, supra.* Section 1962(c) reaches persons employed by or associated with the enterprise who are not involved in management. It was not necessary to show that Lazzara was in a management position for a conviction under RICO. The evidence was sufficient to show his association with the enterprise and participation in its affairs through the arson and mail fraud activities. We affirm Lazzara's conviction on Count 2.

Our affirmance of Lazzara's conviction on Count 2

leads inexorably to affirmance of his conviction on Count 1 for the reason previously articulated.

Rosario Palermo:

[92] The jury convicted Palermo on Counts 1, 2, 3 and 4. His appeal on the claim of insufficient evidence, aimed only at the RICO convictions, is multi-faceted. He claims: (1) that the single act of arson in which he was involved did not constitute a pattern of racketeering activity; (2) that a customer of the arson services offered by the enterprise does not fall within the category of associates of the enterprise participating in the conduct of its affairs; and (3) that if his conduct amounted to conspiratorial behavior, it was a limited conspiracy separate and apart from the one alleged in the indictment. Palermo does not specifically challenge the mail fraud convictions. Having examined the evidence generally, we affirm his convictions on Counts 3 and 4.

Property located on Taliaferro Street grounded Palermo's involvement and convictions. Although Guarino was part owner of the property, it was recorded only in Palermo's name. They purchased the building in March 1973 and the existing insurance coverage was transferred to Palermo. The property was partially burned shortly thereafter and insurance was recovered for the damage. In August 1973 Palermo obtained additional insurance on the house after making certain repairs necessitated by the previous fire. In late September Noriega, assisted by Guarino and Scionti, burned the house. The insurance company paid the full face value of the policy.

[93] Palermo's first argument is without merit. The alleged "single act of arson committed to defraud an in-

surance company" actually consisted of the arson and two acts of mail fraud in the collection on the insurance policy. Contrary to Palermo's suggestion, the two acts of mail fraud were more than "intertwined events" or "incidental statutory violations" arising out of the arson. The arson and mail frauds were evidence of the predicate crimes related to the affairs of the enterprise, thus meeting the requirements for proving a pattern of racketeering activity. *See Bright, supra; United States v. Morris,* 532 F.2d 436 (5th Cir. 1976).

[94] Palermo's second argument is likewise rejected. Palermo was not a mere "customer" of an enterprise offering arson services; he was a part of the enterprise itself, as charged in the indictment. The "enterprise" of which Palermo claims to have been only a customer was not a duly formed corporation with elected officers and annual meetings. It was "an amoeba-like infra-structure," *Elliott,* 571 F.2d at 898, involved in a network of secret criminal activity. Congress decreed that by committing two of the designated predicate crimes related to the affairs of the "enterprise," a person participates in the enterprise and thus violates RICO. As distinguished from the Travel Act, 18 U.S.C. § 1952, and the provision relative to illegal gambling businesses, 18 U.S.C. § 1955, both of which do not reach customers, 18 U.S.C. § 1962 does contemplate the prosecution of those "customers" who engage in a pattern of racketeering activity in furtherance of the affairs of the enterprise. By definition such a person becomes more than a customer of the enterprise.

[95] We also reject Palermo's third argument that his was a limited conspiracy and not the one charged in the indictment. Each arson and subsequent mail fraud committed by the various defendants was a piece of the overall scheme. Palermo's alleged separate conspiracy was not a

separate conspiracy at all; it was an integral part of the arson enterprise at work in Tampa. *See Diecidue, supra.* We affirm Palermo's convictions.

John Fisher:

Fisher stands convicted on Counts 1, 2, 32 and 33, based on his involvement in the N. Armenia Street fire. His challenge to the sufficiency of the evidence is based solely on Noriega's alleged incompetence and lack of credibility as a matter of law. That issue has been discussed and resolved adversely to Fisher. His convictions are affirmed.

Jimmy Farina:

Farina, a former Captain with the Tampa Fire Department, stands convicted of the two RICO counts and of mail fraud Counts 9 and 10. The convictions are based on the arson involving Farina's property on 20th Avenue in Tampa.

The evidence reflects that Farina met with Noriega and Martino to discuss the acquisition of certain property located off Bayshore Boulevard in Tampa. Their plans were to insure and then burn the property to collect the insurance. The property was to be put in Noriega's name because no property titled in his name had been burned as of that time. These plans were aborted.[18] During discussions concerning other property, Farina made known that he wanted his 20th Avenue building burned. The building was insured for $4,000 and Farina agreed to pay Noriega 10% to burn it. Noriega and Guarino subsequently set fire

[18]Martino was charged in Counts 9 and 10 with Farina but was acquitted on those mail fraud charges.

to the premises. Farino submitted a claim on his policy and recovered the full $4,000. Noriega was paid $400.

[96-98] Farina contends that the evidence offered was insufficient to prove that he was associated with the enterprise, participated in the conduct of its affairs or conspired with its members. He argues that albeit he purchased Noriega's services, he could not have joined the enterprise because the evidence does not show he had knowledge that Noriega acted in concert with others. The jury may draw the natural inferences arising from evidence, including an inference of association, and was entitled to infer that Farina, while dealing directly only with Noriega and possibly Martino, was aware of the existence of the ongoing arson operation. Farina approached Noriega with the suggestion that they acquire, insure and burn property, as well as the suggestion that his property on 20th Avenue be torched. It is reasonable to infer from that evidence that Farina indeed knew about the person with whom he was dealing. "A party to a conspiracy need not know the identity, or even the number, of his confederates." *Elliott,* 571 F.2d at 903, *quoting United States v. Andolschek,* 142 F.2d 503, 507 (2d Cir. 1944). The government did not have to prove that Farina knew all of the details or the full extent of the enterprise; proving knowledge of the essential nature was sufficient. Furthermore, "[w]hen a person 'embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them.'" 571 F.2d at 904. The jury could reasonably infer that by his dealings with Noriega, Farina joined in the activities of the enterprise. That conclusion leads to the inquiry whether Farina can be convicted of a RICO violation when the evidence reflects particiation in only one arson. We have answered this in-

quiry in the affirmative. Once Farina joined the conspiracy, he could "withdraw," but only by taking some affirmative action to defeat or disavow the purpose of the conspiracy. *United States v. Killian,* 639 F.2d 206 (5th Cir. 1981); *Bradsby, supra.* The one claiming withdrawal has the burden of proof. The evidence does not establish withdrawal by Farina. Farina also argues that his participation in the arson and mail frauds constituted a singular criminal episode which does not constitute a "pattern of racketeering activity." This argument has also previously been discussed and rejected.

We find the evidence sufficient to support Farina's convictions on Counts 1, 2, 9 and 10.

William H. Brown:

The jury found Brown guilty of Counts 1, 2, 30 and 31. his challenge on appeal targets the convictions on Counts 1 and 2. He argues that the government did not prove the required two predicate acts and, therefore, he could not be found guilty of violating RICO. We disagree.

[99] Brown bifurcates his argument. First, he contends that his alleged involvement in the fire on Lopez Drive did not amount to a predicate act. The evidence shows that Brown provided Noriega with transportation to and from the site of that arson, waiting nearby while Noriega did his work. Brown denies any knowledge of Noriega's purpose in visiting that address that day. We need not decide whether Brown was guilty of aiding and abetting in that arson because the evidence of his involvement in the burning of his hardware store is sufficient to establish that he engaged in a pattern of racketeering activity.

Brown's convictions are based on the arson of his hardware store located on S. Westshore Boulevard in Tampa.

He does not deny that he had the store burned. Instead, he takes the position that the hardware store arson is a single predicate act which is insufficient to support a RICO conviction. This argument has been previously advanced and rejected. Brown's convictions on Counts 1, 2, 30 and 31 are affirmed.

Robert Young:

Young's involvement in the arson on N. Armenia Street served as the basis for his convictions on Counts 1, 2, 32 and 33. Young takes the position that the only evidence having any tendency sufficiently to establish his guilt is the testimony of Noriega. He then argues that Noriega was incompetent as a witness for two reasons: (1) based on the psychiatric testimony produced at trial, Noriega was not credible as a matter of law, and (2) because Noriega had already become a government informant by the time the arson occurred on N. Armenia Street, he was incapable of providing the other part of a conspiracy.

[100] Young's first argument has already been discussed and rejected. We likewise reject Young's second argument. From the record it is unclear exactly when Noriega began to talk to state and federal authorities. Tampa Fire Marshal Bertrand O. Fox testified that Noriega first began to cooperate with the FBI in 1975. Noriega testified that his first meeting with government authorities occurred in early 1976, but that the parties involved were not able to reach an agreement at that time and that he did not begin cooperating with them until several months later. While there obviously is a conflict in the evidence as to exactly when Noriega became a government informant, the answer to that question is not as significant as Young suggests. His reliance on *United States v. Chase,* 372 F.2d 453 (4th Cir.), *cert. denied,* 387

U.S. 907, 87 S.Ct. 1688, 18 L.Ed.2d 626; 387 U.S. 913, 87 S.Ct. 1701, 18 L.Ed.2d 635 (1967), is misplaced. That case stands for the proposition that "one who acts as a government agent and enters into a purported conspiracy in the secret role of an informer cannot be a co-conspirator." *Id.* at 459, *citing Sears v. United States,* 343 F.2d 139 (5th Cir. 1965). The rule applies in situations where the conspiracy involves only a defendant and a government informer. In that situation there can be no conspiracy because it takes two to conspire and the government informer is not a true conspirator. *Sears, supra.*

[101] The conspiracy involving Young included others besides Noriega. For example, Young conspired with John Fisher. His position is not governed by the rule of *Sears;* rather, it comes within the ambit of the rule stated in *Sigers v. United States,* 321 F.2d 843, 848 (5th Cir. 1963), that "a conspiracy may be proved even though the link connecting many of the activities of the conspirators is a Government informer." *See also United States v. Klein,* 560 F.2d 1236 (5th Cir. 1977), *cert. denied,* 434 U.S. 1073, 98 S.Ct. 1259, 55 L.Ed.2d 777 (1978).

Young argues that justice demands that his convictions on the mail fraud counts, Counts 34 and 35, be reversed because there was no evidence to show that he asked, requested or insisted that the insurance agent use the mails in processing the claim. Further, since John Fisher filed the claim, Young denies any responsibility for the fraud.

[102] This argument is not persuasive. As noted earlier, it was not necessary that Young actually do the mailing or instruct another to use the mails in order to be guilty of mail fraud. An individual participant in a scheme encompassing mail fraud will be liable for the acts of his co-schemers when such acts are within the general scope of

the scheme. He can disclaim responsibility only if he undertakes some affirmative act of withdrawal. *Rodgers, supra.*

[103, 104] Furthermore, it is well settled that one "causes" the use of the mails when he does some act in which it is reasonably foreseeable that the mails will be used. *United States v. Crockett,* 534 F.2d 589 (1976). Because Young was in the insurance business, it cannot seriously be contended that he was unaware that the mail would probably be used in processing a claim. The evidence showed that Young was part of the scheme to burn the N. Armenia Street property and recover the insurance proceeds. The convictions of Young are affirmed.

Joseph C. Russello:

Russello stands convicted on Counts 1, 2, 28 and 29 as a result of the burning of an office building owned by him on W. Kennedy Boulevard in Tampa. He argues that his convictions must be reversed because the evidence did not show that he was associated with an enterprise through a pattern of racketeering activity. He contends that at most the evidence showed that in connection with the fire, Noriega and Carter were acting independently of each other and independently of the "enterprise." Russello denies any knowledge of the existence of an enterprise as charged in this case. Furthermore, he argues that his two mail fraud convictions do not qualify as a pattern of racketeering activity because they arose out of a single mail fraud scheme and resulted in two separate convictions only because two mailings happened to occur.

[105, 106] We find the evidence sufficient to support the jury's verdicts. Russello's association with Noriega, initially, and then with Carter, supports the inference that he was associated with the enterprise. The enterprise was a

group of people who shared the common goal of burning buildings and collecting fire insurance proceeds, and who worked together to achieve that goal. Certainly every member of the group was not involved in every transaction, but every transaction was part of the overall workings of the enterprise to which every member belonged. That Carter and Noriega acted independently in dealing with Russello does not mean that they were not working on behalf of the enterprise. The record reveals sufficient evidence from which the jury could infer that Russello's actions with members of the enterprise qualified as participating in the conduct of the affairs of the enterprise. As we stated in *Elliott:* "Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs." 571 F.2d at 902-03.

Russello proposes several other issues which have been raised unsuccessfully by his co-defendants. Russello's challenges of his RICO convictions are without merit. We affirm Russello's convictions on Counts 1 and 2.

[107] With respect to the mail fraud convictions, Russello insists that there is a fatal variance between the charge in the indictment and the evidence. Arguably there is some merit to this contention, but we do not find the variance of such substance as to warrant reversal. The indictment charges that Russello, Lazzara, Carter and Noriega devised a scheme to defraud the insurance company by filing a proof of Loss stating they did not know who set the fire. The government offered evidence that the parties involved knew Noriega had set fire to the building. Testimony also indicated that the building's value listed on the claim was inflated. Russello argues that he was convicted of mail fraud on the latter basis, one not specifically

charged in the indictment, and his conviction should be reversed. We disagree. We are not persuaded that the convictions were based on misrepresentation as to value. The reference to value in the testimony of a government witness was almost an aside. Russello offered experts who contradicted the government's suggestion of value. On the other hand the evidence abounds that Carter and Russello falsely denied knowing who set the fire. Russello's convictions on Counts 28 and 29 are affirmed.

CONCLUSION

The convictions of SCIONTI, MARTINO, MORGADO, MACALUSO, HOLT, LAZZARA, RODRIGUEZ, RUSSELLO, FARINA, BROWN, YOUNG, PALERMO, and FISHER, as per the verdicts of the jury, are AFFIRMED.

The convictions of GUARINO on Counts 17 and 18 are REVERSED; his convictions on all other counts are AFFIRMED.

The conviction of CHASE is REVERSED. The conviction of CHASE is REVERSED.

The convictions of LOSTRACCO on Counts 1, 2, 17 and 18 are REVERSED.

MOTION FOR NEW TRIAL

Docket Number 79-2606

Martino appeals from the denial of his post-conviction motion for a new trial based on newly discovered evidence. This evidence consisted of proffered testimony by co-defendant Guarino, who stated that he would have

testified for Martino in a separate trial but that he did not want to testify in his own defense at the joint trial.

[108] The criteria for obtaining a new trial on the basis of newly discovered evidence are:

1. the evidence must be discovered following the trial;

2. facts must be alleged from which the court may infer diligence on the part of the movant to discover the new evidence;

3. the evidence must not be merely cumulative or impeaching;

4. the evidence must be material; and

5. the evidence must be such that a new trial would probably produce a new result.

United States v. Rodriguez, 437 F.2d 940 (5th Cir. 1971).

Guarino's proffered statements related to the burning of four buildings. Guarino stated he never discussed burning any of those buildings with Martino and that Martino was unaware of Guarino's interests in the N. Nebraska Avenue and Columbus Drive properties. He also stated that while Martino was aware of Guarino's interests in the warehouse transaction, Noriega's interest was not disclosed to Martino. Guarino denied having ever paid a kickback to Martino, specifically with respect to the Columbus Drive transaction. During his sentencing hearing, Guarino stated to the court that he made a mistake in not testifying during the trial because Martino, contrary to some of the evidence, "didn't have nothing to do with Nebraska or 12th Street."

[109] Guarino's statements do not satisfy the criteria for the granting of a new trial. We need not decide

whether newly available evidence is the same as newly discovered evidence because we find that the "new" evidence is not such that a second trial would probably produce a different result. Guarino's statements concerning Martino's lack of knowledge and involvement with respect to the N. Nebraska fire would not produce a new result because Martino was acquitted on charges relating to that fire. The 12th Street warehouse fire was not the subject of a substantive charge; testimony concerning that incident related only to Martino's association with the enterprise. Guarino's statement that Martino knew that he, Guarino, and not Noriega was involved would not be contrary to a jury finding that Martino was associated with the enterprise. It would suffice that Martino and Guarino worked together on the warehouse fire. With respect to the Columbus Drive arson, we find that testimony concerning nondisclosure of Guarinos's interest in that property would not likely have changed the jury's verdict. Every member of the enterprise does not have to participate in every transaction engaged in by the enterprise. Furthermore, Guarino's denial of having paid a kickback to Martino for that property is not in direct contradiction to the testimony at trial; Noriega did not testify about a kickback, but rather that they bought out Martino's interest.

[110, 111] The decision to grant or deny a motion for new trial on the basis of newly discovered evidence rests in the sound discretion of the trial judge. We will reverse the denial of such a motion only where "it is shown that the ruling was so clearly erroneous as to constitute an abuse of discretion." *United States v. Antone,* 603 F.2d 566, 568 (5th Cir. 1979). That showing has not been made in this case.

The district court's denial of Martino's motion for new Trial is AFFIRMED.

FORFEITURE

Docket Number 78-3611

[112] The jury reterned verdicts ordering the forfeiture of insurance proceeds collected by defendants Russello, Rodriguez, Martino and Guarino. Martino, Russello and Rodriguez appealed the forfeiture orders; Guarino did not[19] The issue, one of first impression in this court, is whether the term "interest" in 18 U.S.C. § 1963(a) includes income or receipts from racketeering activity.

Under 18 U.S.C. § 1963(a), a defendant convicted of violating RICO must:

> forfeit to the United States (1) any interest he has acquired or maintained in violation of Section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962.

Rodriguez was ordered to forfeit $4,226,83, Russello's forfeiture was for $340,043.09, and Martino was ordered to forfeit $2,500 together with his ownership, interest and property rights in two companies. Ybor Loan Company and M & S Investment Corporation. The appellants' challenges to the forfeiture orders center on the definition of "interest" as used, but not defined, in the statute. The

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[19]Guarino belatedly raises the issue in his brief on appeal of his conviction. This is not sufficient to vest appellate jurisdiction. The order of forfeiture is a different judgment from the sentence and commitment order. A separate notice of appeal was required.

government takes the position that income or profits from an illegal enterprise are forfeitable under § 1963; appellants contend that § 1963 applies only to an interest in an enterprise. Appellants' position is supported by decisions of other courts.

In *United States v. Meyers,* 432 F.Supp. 456, 461 (W.D.Pa.1977), the court indicated that it would be a "strained construction of Section 1963" to classify profits or fruits received from the enterprise as "interest" in the enterprise or as a claim or right that could afford a source of influence over the enterprise. The court went on to note that "the more natural interpretation is that an 'interest' is akin to a continuing proprietary right in the nature of partnership or stock ownership (or holding a debt or claim, as distinguished from 'equity' investment) rather than mere dividends or distributed profits." *Id.* This interpretation was approved by the court in *United States v. Thevis,* 474 F.Supp. 134, 142 (N.D.Ga. 1979), which held that "the limits of forfeiture authorized by 18 U.S.C. § 1963 do not embrace fruits or profits derived from the operation of a § 1962 enterprise." Several factors were considered by the court in reaching that conclusion. The different treatment Congress accorded income and interest was noted – § 1962(a) makes it illegal to invest income derived from racketeering activity in the acquisition of an interest in an enterprise. Congress recognized that income and profits could be generated by racketeering activity but it chose to include in the forfeiture provision only the interest acquired or held and not the income of an enterprise. The *Thevis* opinion also recognized that the "enterprise" concept is the basis of § 1962 and that the forfeiture provision is directed toward an interest acquired or maintained "in violation of Section 1962." Thus the existence of the enterprise is also a cornerstone of § 1963. The court

was convinced that the use of the word "interest" was limited to interest in the enterprise. Our colleagues of the Ninth Circuit, in a well-reasoned opinion, recently held that § 1963 applies to interest "in an enterprise" and not to any form of income or proceeds derived from a pattern of racketeering activity. *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980).

In reaching our conclusion we are impressed by several considerations. In enacting 18 U.S.C. § 1963, Congress permitted *in personam* forfeitures that had previously been prohibited by 18 U.S.C. § 3563. Viewed in that perspective one would expect that Congress would strictly limit forfeitures. In this instance the limitation would be to the defendant's interest in the enterprise he had corrupted. Such an intent was indicated by the comments of Deputy Attorney General Richard P. Kleindienst before the Senate Subcommittee on Criminal Laws and Procedures when he said:

> It is felt that this revival of the concept of forfeiture as a criminal penalty *limited as it is in* § 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter or congressional wisdom rather than of Constitutional power . . . . (Emphasis in original).

Forfeiture under 18 U.S.C. § 1963 – RICO's Most Powerful Weapon, 17 Am.Crim.L.Rev. 379, 385 (1980), *quoting* Measures Relating to Organized Crime, Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 66 (1969). Furthermore, had Congress intended to include fruits and profits, it could have specifically

provided for its, it could have specifically provided for such as it did in the Comprehensive Drug Abuse Prevention and Control Act of 1970, passed by the same Congress in the same month as RICO. 21 U.S.C. § 848(a)(2) states: "Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States – (A) *the profits* obtained by him in such enterprise . . . ." (Emphasis added.)

[113] We are convinced Congress did not intend to include in the forfeiture provision of § 1963 the fruits and profits obtained from a pattern of racketeering activity. We are aware this holding occasions problems with respect to associations in which one cannot own a legal interest, as in the case subjudice. This limitation was recognized by the Justice Department when it stated that "there is often nothing to forfeit . . . in the case of individuals associated in fact." *Forfeiture under 18 U.S.C. § 1963 – RICO's Most Powerful Weapon, supra* at 391, *quoting* U.S. Department of Justice, Explanation of the Racketeer Influenced and Corrupt Organization Statute 2 (4th ed.). The kind of enterprise will, therefore, be critical in the determination of forfeitable interests.

[114] Having concluded that only interests in an enterprise are subject to forfeiture, we reverse the monetary forfeiture orders against Russello, Rodriguez and Martino. The insurance proceeds they received from the burning of their properties were proceeds or profits from the enterprise; the proceeds did not constitute "interest in an enterprise."

[115] We affirm the order of forfeiture of Martino's interest in his two companies because it falls squarely within the language of § 1963(a)(2) which provides for the forfeiture of any interest affording a source of influence

over the enterprise. Both of Martino's companies were active in the enterprise. They provided funds for the arson and fraud ventures. The M & S Investment Corporation purchased property with the intent to burn it, but sold the property to someone else who then burned it. Martino was an active participant; he played an important role within the enterprise, a role made even more effective because of the companies he managed. The Act requires forfeiture of his interest in these companies.

The orders of monetary forfeiture entered against Martino, Russello and Rodriguez are REVERSED. The order of forfeiture of Martino's interest in Ybor Loan Company and M & S Investment Corporation is AFFIRMED.

APPENDIX

As noted below, some fires were listed only as overt acts and/or acts of racketeering in Counts 1 and 2 while others were also the subjects of mail fraud counts (Counts 3 through 35). We list only those fires that are at the core of the convictions appealed. All addresses are in Tampa, Florida, unless otherwise indicated.

1. 1202 E. Buffalo Avenue, a bakery (Counts 1 and 2) – Guarino and Scionti burned the premises with the help of two other arsonists who died as a result of the fire.
2. 3401 24th Street (Counts 1 and 2) – Guarino, Noriega and Scionti burned a frame house owned by Scionti in his brother's name. Scionti received a $4,000 settlement on the insurance policy.
3. 1811 Taliaferro Street (Counts 1, 2, 3 and 4) – Guarino, Noriega and Scionti burned a frame house belonging to Palermo and Guarino (silent partner).

This house was burned twice; insurance proceeds were collected by Palermo both times. The first time he collected on a policy transferred to him when he bought the house. After the first fire, he made cosmetic repairs to the house and obtained insurance coverage through a different agency. After the second fire, he collected the full face value of this policy, $1,000.

4. 20410 Old Cutler Road, Miami (Counts 1, 2, 5 and 6) – Guarino, Scionti and Noriega burned a laundromat belonging to Lazzara. Lazzara received only $15,117 although he submitted a claim for $40,000.

5. 2208 10th Street and 923 12th Avenue (Counts 1, 2, 7 and 8) – Guarino, Noriega and Macaluso burned two adjacent frame buildings owned by Rodriguez. $4,226.83 was collected by Rodriguez through the help of Carter.

6. 2917-2917 1/2 20th Avenue (Counts 1, 2, 9 and 10) – Noriega and Guarino burned a frame house owned by Farina in his mother's name. Farina received $4,000 in insurance proceeds.

7. 3006 No. Nebraska Avenue (Counts 1, 2, 11, 12 and 13) – Macaluso bought a house from Noriega and had Guarino and Noriega burn it. With help from Carter, $23,000 in insurance proceeds was paid to Macaluso.

8. 2020 E. Columbus Drive (Counts 1, 2, 14, 15 and 16) – Noriega and Guarino burned a frame house acquired by Noriega through the assistance of Martino. With the help of Carter, $20,000 was paid on three different insurance policies, two purchased by Noriega and one transferred to him by the prior owner. The property was later burned again by Noriega and he collected an additional $7,105.77.

9. 2510 12th Street (Counts 1 and 2) – Martino purchased an option on a warehouse with the intent to insure it and then burn it. Necessary repairs were made in order to obtain insurance. Guarino and Noriega then bought the option from Martino then bought the option from Martino and put it in the name of Alex Fekete who exercised the option. An office was set up in the warehouse and a $50,000 insurance policy was obtained (in addition to the $30,000 policy transferred from the previous owner who retained a mortgage position for the credit portion of the sale). When more money was needed to cover repairs, Chase got a loan from a client who was given a second mortgage. Noriega burned the property. Fekete had allowed the additional insurance to lapse by failing to pay the premiums. The insurance recovery on the original insurance was paid to the first mortgage holder.

10. 2114 27th Street (Counts 1, 2, 17 and 18) – Fekete and Noriega burned an apartment owned by a relative of Lostracco (co-worker of Martino in his real estate business). A transfer of the property from Lostracco's brother-in-law to Jimmy Traina (straw man for Noriega and Guarino) was attempted but was not completed before the property was burned. The $4,500 in insurance proceeds was initially paid to Lostracco's brother-in-law, but was later delivered over to Noriega, Guarino and Arrigo.

11. 409 E. Oak Street (Counts 1, 2, 19 and 20) – Guarino and Noriega burned a two-story frame house owned by Guarino. The house had been "placarded" by city housing inspectors prior to the fire. Cosmetic repairs were made to the exterior of the house and with Carter's guidance, insurance was obtained. Following the fire the insurance company refused to

pay the face value of the policy. Carter intervened and arranged for a $10,000 settlement.

12. 3310 Vasconia Street (Counts 1, 2, 21 and 22) – Noriega and Arrigo burned a house owned by Holt. Morgado had made the necessary arrangements for Holt. When Holt acquired the property he transferred the existing policy and obtained additional coverage. The first attempt at burning the house was unsuccessful; in the second attempt the building was totally destroyed. Holt claimed $41,501.55 under one policy and $36,501.55 under another.

13. 4601 W. Kennedy Boulevard (Counts 1, 2, 28 and 29) – Noriega and Traina set fire to the Central Professional Building owned by Russello. Insurance coverage on the premises paid $340,043.09 through adjustments made by Carter.

14. 3012 Highland Avenue (Counts 1 and 2) – Guarino and Noriega attempted to burn a frame apartment building owned by an acquaintance of Guarino. The fire was spotted by neighbors and extinguished prior to extensive damage.

15. 3658 S. Westshore Boulevard (Counts 1, 2, 31 and 33) – Noriega burned a True Value Hardware Store owned by Bill Brown. Prior to the fire, Brown had obtained $175,000 in additional insurance with the help of Carter. The fire was only partially successful, and though Brown claimed damages of over $100,000, the insurance company estimated the damages at only $15,000 and refused to pay the claim.

16. 1907-1915 N. Armenia Avenue (Counts 1, 2, 32 and 33) – This property was acquired by Fisher and Young through arrangements made by Noriega. After

superficial repairs were made, insurance coverage was obtained. The building was heavily damaged by fire and $125,000 was collected from the insurance company.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	NO. 78-5260
SAM C. MARTINO, *Defendant-Appellant.*	)	*EN BANC*

CERTIFICATE OF INTERESTED PARTIES

The undersigned, counsel of record, certifies that the following listed person has an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Sam C. Martino, Defendant-Appellant.

CLAUDE H. TISON OF
MACFARLANE, FERGUSON
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Post Office Box 1531
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Attorney for Defendant-Appellant

CERTIFICATE OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and of the United States Court of Appeals for the Fifth Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *United States v. Turkette,* ____ U.S. ____, 49 U.S. L.Wk. 4743 (June 17, 1981, Kotteakos, v. United States, 328 U.S. 752 (1946); *United States v. Diaz-Munoz,* 632 F.2d 1330 (5th Cir. 1980).

I further express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

> Whether a conviction under 18 U.S.C. § 1962(c) for conducting the affairs of an enterprise through a pattern of racketeering activity may be sustained where there exists no distinction, conceptually or in the evidence, between the enterprise itself and the series of predicate crimes constituting the pattern of racketeering activity through which its affairs were conducted;
>
> Whether a single act or transaction may constitute a pattern of racketeering activity within the meaning of 18 U.S.C. § 1962, if it is possible for the actor to be convicted of two or more criminal charges in consequence of that single act or transaction;
>
> Whether the due process clause of the Fifth Amendment, and Rule 14, Fed.R.Crim.P., permit the mass trial of 20 defendants on RICO and predicate mail fraud charges, where the only fac-

tual connection among the defendants is that they engaged in similar conduct, on separate occasions unrelated to each other, which consists of engaging the services of, or furnishing services or property to, a person or group engaged in the business of performing that type of criminal conduct.

CLAUDE H. TISON, JR.
ATTORNEY OF RECORD
FOR SAM MARTINO

ISSUES FOR WHICH EN BANC CONSIDERATION IS REQUESTED

Whether a conviction under 18 U.S.C. § 1962(c) for conducting the affairs of an enterprise through a pattern of racketeering activity may be sustained where there exists no distinction, conceptually or in the evidence, between the enterprise itself and the series of predicate crimes constituting the pattern of racketeering activity through which its affairs were conducted;

Whether a single act or transaction may constitute a pattern of racketeering activity within the meaning of 18 U.S.C. § 1962, if it is possible for the actor to be convicted of two or more criminal charges in consequence of that single act or transaction;

Whether the Fifth Amendment's guarantee of due process permits sustaining a conviction under 18 U.S.C.§ 1962, by relying on criminal charges of which the defendant was acquitted for one or more predicate crimes necessary to constitute the pattern of racketeering activity;

Whether the due process clause of the Fifth Amendment, and Rule 14, Fed.R.Crim.P., permit the mass trial of 20 defendants on RICO and predicate mail fraud charges, where the only factual connection among the defendants is that they engaged in similar conduct, on separate occasions unrelated to each other, which consists of engaging the services of, or furnishing services or property to, a person or group engaged in the business of performing that type of criminal conduct.

COURSE OF PROCEEDINGS AND DISPOSITION

Sam Martino, a Tampa real estate dealer and mortgage lender, was indicted with 22 co-defendants in a 35 count indictment charging 189 violations of the Racketeer Influenced and Corrupt Organizations Act, 28 U.S.C. 1962, (RICO) and the mail fraud statute, 18 U.S.C. § 1341. The indictment alleged that Martino and his co-defendants agreed to, and did, conduct the affairs of an enterprise through a pattern of racketeering activity. The enterprise was described as "a group of individuals associated in fact for the purpose of defrauding certain insurance companies by use of the mails, and by committing acts of arson"(R.1/1). The pattern of racketeering activity through which the defendants allegedly conducted the affairs of the enterprise consisted of the commission of arsons and the use of the mails to submit claims for the proceeds of insurance policies on the burned properties. The indictment alleged the setting of 21 fires in a four year period, of which 16 resulted in submission of fraudulent insurance claims.

The central figure in the enterprise was Willie Noriega, who was charged in every count of the indictment and who set each of the charged fires, either to collect insurance proceeds directly, in the case of properties he or his associates in the arson business owned directly, or for a fee paid by the property owner, in the case of property owned by a customer who would procure Noriega's arson services on a contract basis. In addition to the substantive and conspiracy RICO counts with which all defendants were charged, Martino was charged with 7 counts of mail fraud, involving insurance claims submitted in connection with three fires set between February and April 1974. Counts 9 and 10 involved a house owned by an estate in which defendant Jimmy Farina owned a one-fourth

beneficial interest. Noriega testified that in January 1974 he agreed with Farina to burn the house for $400; Martino lent Farina the money to pay Noriega's fee, expecting repayment from the insurance proceeds. Martino was acquitted of the charges related to this fire.

Counts 11-13 involved a building at 3006 N. Nebraska Avenue, which Noriega bought in November 1973, assisted by a first mortgage loan from Ybor Loan Co., of which Martino was president. This was Noriega's first contact with Martino, who Noriega testified received a $1,500 kickback from the loan proceeds and was privy to the scheme to burn the building. The loan was repaid from the insurance proceeds after Noriega burned the building in 1974. Martino was acquitted on all counts relating to this fire.

Counts 14-16 related to a building at 2020 Columbus Drive, owned by Bessie Williams. The previous owners, named Ferlita, had taken a purchase money mortgage when they sold the property to Mrs. Williams; Ybor Loan Co. was servicing the mortgage. Neither Martino individually, nor any company with which he was connected, had ever had an interest in the property as owner or mortgagee. Noriega testified that in January 1974 Martino suggested he contact Mrs. Williams, and soon afterward induced her to sell Noriega the property; after the sale he extended to Noriega a $2,500 second mortgage loan for repairs. Noriega testified that Martino wanted half the insurance proceeds but agreed instead to accept $2,000 before the fire, of which Noriega and co-defendant Paul Guarino each paid one-half in February 1974. With the assistance of Joseph Carter, an insurance adjustor who assisted Noriega in processing fraudulent insurance claims, Noriega obtained two new insurance policies besides the original policy on the building, which Martino

ordered cancelled when he was notified that new policies had been issued. Noriega burned the building in April 1974; the first mortgage to the Ferlitas, and the second mortgage to Ybor Loan Co., were paid out of the insurance proceeds. This was the last contact Martino was alleged to have had with Noriega, who continued setting fire to other buildings with which Martino had no connection for more than two more years, through June 1976. Martino was convicted of the mail fraud counts relating to the Columbus Drive fire, which also served as the "predicate crimes" for his conviction on the RICO counts.[1]

The jury were instructed that the conviction of any defendant on at least two mail fraud counts would support a finding that he engaged in a pattern of racketeering activity sufficient to convict him on the RICO counts, even if both mail fraud counts stemmed from the same act or transaction, as was in fact the case with Martino and all but three codefendants. Of the 20 defendants who were tried together from November 1978 to February 1979, only Guarino, Scionti, and Macaluso, each of whom was implicated in the actual setting of fires with Noriega, were found guilty on substantive counts involving more than a single fire.

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[1]In April 1974 Martino assigned a one-year lease held by M&S Investments, a real estate company in which Martino owned an interest, to Alex Fekete, a Noriega confederate who had negotiated with the owner to buy the property, a warehouse. Martino was not involved in the purchase arrangements, the financing, or the insurance arrangements, for the warehouse; he had not taken any insurance covering his interest in the property during the period M&S investments held the lease. The building was uninsured when Noriega burned it in August 1975, sixteen months later. Count two alleged, as an additional predicate crime, that Martino was implicated in the arson of this building.

Martino appealed, asserting *inter alia* that it was improper to permit the jury to find a pattern of racketeering activity based on his involvement in a single act or transaction, merely because two distinct criminal charges could be brought in consequence of that single act. The panel opinion affirmed without reaching that issue, holding that he could be found to have committed multiple predicate crimes constituting a pattern of racketeering activity, by assuming that the jury found he was implicated in the offenses of which he had been acquitted.[2]

Martino also asserted on appeal that a severance should have been granted for three reasons – the unavailability of co-defendants Jimmy Farina and Paul Guarino, who were prepared to testify that Martino did not participate in any discussions or conduct in connection with fires in which he and they jointly were charged; the failure of the evidence to establish a single conspiracy in which the 20 defendants on trial shared a common purpose; and the high probability of confusion and prejudice in the conduct of a trial of 20 defendants, many with similar names, in a small courtroom with obstructions preventing many defendants and their counsel from seeing and hearing all the proceedings, and in some instances preventing the trial judge from hearing statements made in the jury's presence,

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[2]"Martino points to his acquittal on several counts as support for his argument that his limited contact with the enterprise, evidenced by his conviction on charges relating to only one fire, did not amount to participating in the conduct of the affairs of the enterprise. While the jury may not have found that the government proved Martino's guilt in the mail fraud scheme, that does not necessarily mean that the jury did not believe that Martino was somehow involved. The evidence of his involvement, while not sufficient to convict for mail fraud, would support the conclusion that he was associated with the enterprise and a participant in the conduct of its affairs" (Slip opinion at 8260-8261).

these conditions obtaining throughout a three month trial during which more than 200 witnesses testified. The first ground, based on Martino's proffer of co-defendants' testimony, is not addressed in the panel opinion; that issue is the subject of a separate petition for rehearing addressed to the panel. With respect to the claim of variance, the panel thought it immaterial that the evidence may have established many small conspiracies, each involving only a few defendants, so long as each defendant participated in at least one of them.[3]

With respect to the mass trial and the potential for prejudice and confusion, the panel acknowledged that the probability of prejudice was high, and the failure to sever the trials came close to an abuse of discretion, but ultimately relied on the careful and sensitive management of the trial by the District Judge and the fact that the mixed verdicts, including acquittal of four defendants, indicated conscientious deliberation by the jury, to uphold the conduct of this mass trial. Because the findings of the panel on each of these issues appear to depart from controlling precedents of the Supreme Court and of this Court, Martino requests that the case be heard and decided by the full court.

ARGUMENTS AND AUTHORITIES

In *United States v. Turkette,* ____ U.S. ____, 49 U.S. L.Wk. 4743 J(June 17, 1981), the Supreme Court resolved one of the major interpretative controversies over the ap-

[3]"'If the Government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights.'" (Slip Opinion at 8244).

plication of RICO – whether its definition of "enterprise" includes informal associations organized for the sole purpose of committing – by holding that such associations are included. However, the Court resolved the issue in a manner not anticipated by the lower court holdings on either side of the question. The controversy was generated by the overlap between the concept of a wholly illegal enterprise and that of a pattern of racketeering activity. Several courts had concluded that including illicit organizations rendered the "pattern" requirement meaningless, for they could perceive no factual or conceptual distinction between the enterprise itself and the pattern of racketeering activity through which it was conducted. Other courts, including panels of this court, considered that the loosely defined objective of making money through criminal activities was sufficient to define the scope of a RICO enterprise, and an "amoeba-like infrastructure" *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir. 1978) was a sufficient description of its organization. Typical of this mode of analysis is *United States v. McLaurin*, 557 F.2d 1064 (5th Cir. 1977), which upheld the RICO convictions of a group of prostitutes who were sufficiently associated with one another to be deemed an enterprise, and who, as one might expect, conducted the affairs of their association through a pattern of acts of prostitution. The indictment in the case followed that model, defining the enterprise by the pattern of racketeering activity in which its members were asserted to have engaged. The enterprise was an association of persons who intended to profit from arson and mail fraud, and who conducted the affairs of their association through a pattern of arsons and mail frauds.

The Supreme Court in *Turkette* rejected both interpretations of RICO represented by these opposing views. The Court agreed that there must be a distinction between

the enterprise and the pattern of racketeering activity; however, it found it unnecessary to restrict the scope of the statute to legal associations in order to preserve this distinction. The court held that the enterprise element is separate and distinct from the "pattern" element, though the evidence may overlap.

> "In order to secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern or racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. . . . The former is proved by evidence of an ongoing organization, formal or informal, *and by evidence that the various associates function as a continuing unit.* The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the government." _____ U.S. ___, 39 U.S. L.Wk at 4745 [Emphasis supplied].

The critical difference between this case and *Turkette* is that in *Turkette* the defendants were shown to have functioned together as a continuing unit, under Turkette's leaderships, over a substantial period of time. Although

the members of Turkette's enterprise certainly had dealings with other persons who used their services, as in the case of drug sales, or in other connections on a sporadic or occasional basis, such persons were not charged with being parties to the enterprise. In this case, however, the majority of defendants on trial were persons whose contacts with Noriega's arson enterprise were isolated and sporadic. Except for the arsonists themselves, not a single defendant was found by the jury to have been involved in more than one fire. Whether such persons are called customers, suppliers, or some other name, they cannot be called persons who function as a continuing unit to conduct the affairs of an enterprise. It is precisely because the distinction, found critical in *Turkette,* is not drawn in the indictment in this case, or in the analysis of the panel opinion, that there is no distinction here between the enterprise as alleged and the pattern of racketeering activity through which its affairs were conducted.

The indictment alleged a continuing relationship between Martino and Noriega's enterprise, at least between November 1973 and April 1974. It charged that during that period Martino financed enterprise activity in connection with several project. Viewing the case from the perspective of the indictment, or from government counsel's opening statement at trial, one might permissibly view Martino as a member of a continuing unit associated with or part of the enterprise. But the jury did not accept that view. Martino was acquitted of nearly all the crimes with which he was charged. As the panel opinion acknowledges, he was convicted in connection with only a single transaction, and even in that transaction his role was limited. According to Noriega's testimony, Martino suggested that Noriega negotiate with Mrs. Williams to buy the Columbus Drive house; when the sale was con-

summated Martino lent Noriega $2,500 on a second mortgage. Noriega further testified that he and Guarino each paid Martino $1,000 for his assistance. Based on Noriega's testimony that Martino knew, when Noriega bought the property and when Martino made the second mortgage loan, that Noriega intended to burn the building and collect excess insurance proceeds, the jury could find Martino guilty of three separate counts of mail fraud that resulted from Noriega's submission of an insurance claim and the mailing of two settlement check by the insurance company. The instructions further authorized the jury to find that this isolated act constituted a pattern of racketeering activity warranting Martino's RICO conviction.

The panel opinion avoids reaching this issue by relying on other offenses with which Martino was charged but which the jury rejected. It concludes that Martino could be found to have had a continuing role in Noriega's enterprise, based on the allegations and evidence of arson and mail fraud in counts 9-13, even though he was acquitted of all those offenses. The panel's reliance on charges of which Martino was acquitted, as predicate crimes or evidence of association to support his RICO conviction, is irrational and unconstitutional.[4]. It is one thing to say that a jury's verdicts on two factually related counts need not be logically consistent with each other; it is quite another to

[4]It is also contrary to the jury instructions, which defined a pattern of racketeering activity in terms of the predicate offenses charged in Counts 3-35, and informed the jury that conviction of a defendant on any two of those counts would warrant a finding that he had engaged in a pattern of racketeering activity. There was nothing that even remotely suggested that the jury might permissibly consider, as a predicate crime, an act in connection with which they found a defendant had no criminal liability. Had any such instruction been given, it would have been plain error.

say that a jury may acquit a defendant of an offense, yet use the very offense of which it has acquitted him as a predicate for his conviction of another offense. A verdict of not guilty resolves in the defendant's favor the contested issues of fact necessary to that verdict. *Ashe v. Swenson*, 397 U.S. 436 (1970); *Sealfon v. United States*, 332 U.S. 575 U.S. 575 (1948). The only disputed issue in connection with the offenses charged in Counts 9-13 was whether Martino was a participant in the schemes to defraud. It was not in dispute that they existed, or that it was foreseeable from the nature of those schemes that the mails would be used in furtherance of them, or that the mails were actually used. The sole issue was whether Martino participated. The verdicts of not guilty resolved that issue in his favor, and foreclose speculation that he may have been thought to be a participant in those schemes as a predicate to his conviction under RICO. The panel's indulgence in such speculation is a shocking departure from constitutional principles and guarantees, and of itself requires withdrawal of the opinion and reconsideration of the appeal.[5]

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[5]It is theoretically possible that the jury may have found Noriega's August 1975 burning of the Twelfth Street warehouse to be a predicate crime attributable to Martino and supporting his RICO conviction, in addition to the isolated act involving the Columbus Drive house. However, it is highly unlikely, in view of the fact that there was not evidence that Martino had any connection with Noriega, any other member of Noriega's enterprise, or any enterprise activity, for 16 months before Noriega set that fire, or that Martino had anything to do with Noriega's decision to set it. At all events, the principle is well established that if it cannot be determined whether a verdict is grounded on a permissible basis or an impermissible basis, the conviction cannot stand.

The panel's treatment of the issue of variance, and the probability of prejudice resulting from a mass trial, departs from the teaching of the Supreme Court and previous decisions of this Court. Not surprisingly, in view of the wide separation in time, place, and circumstances of most defendants from each other and from the activities with which they were charged, the panel declines to find that the evidence would have supported a conclusion that all defendants were members of a single conspiracy, united by a shared purpose to conduct the affairs of Noreiga's enterprise though a pattern of racketeering activity. It acknowledges that the evidence lends itself to, and may compel, a finding that if any conspiracy existed, there were many of them, each relating to only one or a very few fires, each unconnected with and unrelated to any other except that in each case Noriega was the arsonist. Yet, the panel says that there is no prejudice resulting from the trial en masse of 20 defendants for these multiple unrelated conspiracies so long as ". . . the government proves [each] defendant's involvement in at least one of them. . . ." (Slip Opinion at 8244).[6] This, ironically, is exactly the ground

[6] *United States v. Waymon*, 510 F.2d 1020 (5th Cir. 1975) and *United States v. L'Hoste*, 609 F.2d 796 (th Cir. 1980) do not support the conclusion that the variance was not prejudicial. In *Waymon* six defendants were prosecuted for conspiracy, mail fraud and wire fraud, based on an advance fee swindle they operated through Allied Mortgage Consultants, Inc. Two witnesses indicated that defendant Waymon had a side venture in addition to his participation with his co-defendants, in which he operated a similar scheme through another company. This Court concluded, in view of the small number of defendants and the minor variance, consisting not of multiple conspiracies but an additional conspiracy besides the one charged, that *Berger* rather than *Kotteakos* governed the decision. The result in *Waymon* is as unremarkable as it is inapplicable to a factual situation such as is presented here.

The *L'Hoste* defendants were a construction company and three employees, including its president, charged with conspiring to obtain sewer construction business in Jefferson Parish, Louisiana by paying

on which the Second Circuit found harmless error in *United States v. Lekacos*, 151 F.2d 170 (2d Cir. 1945), rev'd sub nom. *Kotteakos v. United States*, 328 U.S. 752 (1946) in dealing with a virtually identical variance. Space limitations do not permit in depth analysis here of that decision and the underlying facts. Suffice it that the case involved a joint trial of 19 persons charged conspiracy to obtain fraudulent FHA loans, that all defendants had obtained their loans through Simon Brown, the government's star witness who had procured over 100 of them, but they were otherwise unconnected with one another (except that in some cases two or three defendants together obtained one or more loans). The Court of Appeals held that, though they had no common purpose and their conspiracies were multiple, the jury must have found, as to any defendant, that he participated in a smaller conspiracy involving at least himself and Brown, and therfore the variance was harmless. The Court relied on *Berger v. United States*, 295 U.S. 78 (1935), a conspiracy trial of four defendants where the proof showed that some defendants were involved in a similar venture unconnected with the overall conspiracy. That variance was held harmless error. In *Kotteakos,* however, the Court declined to apply *Berger* as a general principle that all such variances are harmless, pointing out that where in *Berger* the number of defendants was small and the variance minor, the situation in *Kotteakos* involved 19 defendants, 12 of whose cases

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bribes and kickbacks to awarding authorities. The defendants contended that each sewer job which the company performed was a separate conspiracy, which the Court rejected, specifically finding that a single conspiracy to corruptly obtain the parish sewer business was proved. Neither *L'Hoste*, nor *Waymon*, nor any other case cited, bears on the situation presented here. The magnitude of the case is too great, the number of defendants too large, and the absence of concerted activity and common purpose too glaring, to permit a finding of harmless variance.

were submitted to the jury, and upward of 8 separate conspiracies, with Simon Brown (together with his construction company and some of his employees) the only common element. In such a situation, the Court said, the danger of guilt by transference in a mass trial is too great to tolerate, even without a specific showing of prejudice.

The panel decision on the variance issue should have been governed by *United States v. Diaz-Munoz*, 632 F.2d 1330 (5th Cir. 1980), where prejudice was found to result from a variance between the allegations and the proof. The panel distinguishes *Diaz-Munoz* on the ground that there was a mis-joinder in that case. While the term "mis-joinder" is used in the opinion, it is used loosely and not in the sense of a mis-joinder under Rule 8, Fed.R.Crim.P. Insofar as the pleadings were concerned – a misjoinder under Rule 8 is an issue of pleading, not a question of evidence – the joinder of all defendants and all counts were proper. The allegations of the indictment were to the effect that the defendants conspired to commit a series of frauds on shippers and insurance companies, and further had joined to conceal the income received from the execution of those fraudulent schemes. The Court noted that if the government's evidence had conformed to its representations to the trial court about what it expected to prove, joinder would have been proper. It was the failure of the evidence to substantiate the charge hat the defendants had acted in common that rendered the joinder prejudicial. The question with which the Court actually dealt, therefore, is not one of mis-joinder under Rule 8 but one of prejudicial joinder under Rule 14, precisely the question presented here. The difference is that the joinder in this case, where 20 defendants were tried together for three months, and where the evidence showed, not a single conspiracy but 12 or more factually unrelated conspiracies in-

volving discreet groups of persons, with no common threat but the fact that Willie Noriega set each of the fires, is far more prejudicial than was the joint trial in *Diaz-Munoz.*

In this case the panel found that the mass trial of 20 defendants for three months generated such a risk of confusion and mass guilt that the refusal to sever the case stopped barely short of an abuse of discretion. The panel's refusal to reverse on this ground, despite clear prejudice, stems largely from its reluctance to imply criticism of the conduct of the trial judge, who concededly tried valiantly to minimize the likelihood of prejudice. But is does not imply criticism to acknowledge that a judge is not omnipotent, that there is a limit to the size and length of trials, beyond which it is humanly impossible, despite the best will in the world, to afford assurance that so many cases will be determined individually and fairly, apart from the mass. The panel here asserted that it was "keenly aware" of the likelihood of prejudice in such a trial, and that it does "not encourage trials *en masse*" (Slip Opinion at 8248). An earlier panel of this Court, speaking of a smaller and shorter trial, made the point more strongly, proclaiming that our "society disdains mass prosecutions because we abhor the totalitarian doctrine of mass guilt." *United States v. Elliott*, 571 F.2d 880, 905 (5th Cir. 1978). Yet slowly, steadily, trials grow longer and larger. Each time a court declares that, though it does not condone mass trials it will not stop one from happening, it becomes easier to conduct trials *en masse*, and we come that much closer to accepting the totalitarian doctrine of mass guilt. RICO facilitates application of that totalitarian doctrine, with its focus on group liability. It requires imposition and stern enforcement of limits to its application, to prevent its becoming an instrument of totalitarian terror, precisely as

rather similar statutes operated in Nazi Germany, when the German courts lost the will to stand between the people and tyranny.

Had the Supreme Court not already lead the way in *Kotteakos,* this case might present the question where the line must be drawn. But it has already been drawn, and this case is beyond it. That is not to say that 20 people can never be tried together, or that no trial may last longer than three months, though one may wonder what proper governmental interest is served by stuffing so many people together in any case, and whether it would not actually conserve judicial time and effort, and promote the fair resolution of issues, to place an absolute limit on the number of people whose guilt or innocence may be submitted to a single jury. It is to say that the conceptual limit to the size of a common trial is a showing of common purpose, that unless the government shows that people it wishes to try collectively acted collectively pursuant to a shared purpose, they cannot be made to share a courtroom while their guilt or innocence is being determine. The danger of confusion, prejudice, and mass guilt is too great to permit such a trial as this. If we are to have any hope of maintaining our tradition that determinations of innocence of guilt be individual and personal, this judgment cannot stand.

CONCLUSION

For the reasons set forth above, appellant Sam Martino respectfully requests that the opinion of the panel be withdrawn, that the case be set for rehearing under such condition as may be appropriate to permit the full court to consider these issues, and that after hearing the judgments below be reversed with such directions as are appropriate to the ground of decision.

Respectfully submitted,

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ATTORNEYS FOR SAM C. MARTINO

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

UNITED STATES OF AMERICA	)	
Plaintiff-Appellee,	)	
	)	Nos. 78-36111
v.	)	78-5260
	)	79-2606
SAM C. MARTINO	)	
Defendant-Appellant	)	

PETITION FOR REHEARING

Defendant/Appellant Sam C. Martino petitions the Court for a rehearing of his appeals on the issues set forth below, and would show the Court that in respect of these issues certain claims raised on the appeal have been overlooked, correct precedent misapplied to the evidence, or resolution of issues has been based on incorrect statements of the evidence.

I

THE DISTRICT COURT ERRED IN DENYING MARTINO'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNTS 1 and 2, SINCE THE EVIDENCE FAILED TO SHOW THAT HE PARTICIPATED IN THE CONDUCT OF THE AFFAIRS OF THE ENTERPRISE, WHERE HIS ONLY CONTACT WITH IT WAS IN ISOLATED TRANSACTIONS WITH CERTAIN OF ITS MEMBERS.

Two days before the panel's opinion in this case was released, the Supreme Court decided *United States v. Turkett*, ___U.S.___, 49 U.S. L.Wk. 4743 (June 17,

1981), holding that, although the "enterprise" concept in RICO applies to illegal as well as legal associations, the enterprise must be conceptually distinct from the pattern of racketeering activities through which the affairs of the enterprise are conducted. As set forth in detail in Martino's separate petition for *en banc* rehearing, which is being filed concurrently with this petition directed to the panel, previous decisions of this Court have not specifically required a separate showing of an enterprise from the pattern of racketeering activity, and have affirmed RICO convictions upon evidence in which the pattern of racketeering activity is indistinguishable from the enterprise itself. See e.g., *United States v. McLaurin,* 557 F.2d 1064 (5th Cir. 1977). Nor did the panel opinion in this case require that the government prove that the persons it alleged to be members and associates of Noriega's enterprise function "as a continuing unit" 49 U.S. L.Wk. at 4745. The requirement that proof of an enterprise incorporate a showing that its members and associates functioned as a continuing unit requires reconsideration of the Court's holding that a defendant may be convicted under RICO, even though his only association with the enterprise was in a single isolated act or transaction which permitted him to be charged with two or more separate offenses, the two offenses arising from the same act constituting the two predicate crimes on which a pattern of racketeering activity is found. When a defendant has such isolated and sporadic contact with an enterprise that the predicate crimes must be found by multiplying the charges that may be instituted as a result of a single act or transaction, he clearly has not been shown to have participated as a part of a continuing unit.

The panel noted that Martino was convicted of substantive offenses involving only a single fire set by Willie

Noriega, a situation that could not involve any degree of continuity. However, the panel held that a pattern of racketeering activity committed by Martino could be found by adding to the offense of which he was convicted a presumed participation in offenses of which he was acquitted, stating that the acquittal "does not necessarily mean that the jury did not believe that Martino was somehow involved [in the underlying conduct]" (Slip Opinion, Note 15 at 8260). Martino submits, for reasons more fully set forth in the petition for rehearing *en banc*, that any reliance on charges of which he has been acquitted, as a predicate for a finding of guilt on another charge, is constitutionally impermissible, such use of an acquittal being barred by estoppel. *Ashe v. Swenson*, 397 U.S. 436 (1970); *Sealfon v. United States*, 332 U.S. 575 (1948). The issue of Martino's participation in the schemes to defraud involved in the charges of which he was acquitted was the only factual issue that could rationally be said to have been in dispute. There was no dispute about the mailing, the foreseeability of mailing, or the existence of a scheme to defraud. The jury's acquittal of Martino on those counts necessarily constitutes a factual determination that he was not a part of the scheme to defraud alleged in those counts. Consequently, reliance on his "involvement" in those schemes as a predicate for his conviction on the RICO counts is as impermissible as would be a re-trial on those charges after acquittal.

II

THE DISTRICT COURT ERRED IN DENYING MARTINO'S MOTION FOR SEVERANCE BEFORE AND DURING TRIAL, WHERE THE EVIDENCE SHOWED, AT MOST, HIS INVOLVEMENT IN A SINGLE LIMITED TRANSACTION UNRELATED TO THE CONDUCT OF THE AFFAIRS OF THE ENTERPRISE OR TO A CONSPIRACY TO CONDUCT ITS AFFAIRS.

The panel misapplied the decision of the United States Supreme Court in *Kotteakos v. United States,* 328 U.S. 752 and the decision of this Court in *United States v. Diaz-Munoz,* 632 F.2d 1330 (5th Cir. 1980), among others. *Kotteakos* has been analyzed at length in Martino's main brief, at pages 27 through 33. That decision unambiguously holds that a mass trial of many defendants is improper, where they are not shown to have acted together pursuant to a common purpose, the degree of prejudice being augmented as the number of defendants, and the number of conspiracies, increase. The panel opinion properly refrained from finding that the government had proven the single conspiracy that it alleged in the indictment; finding a single conspiracy would have been completely unjustified on this record. However, the panel holds the variance harmless, relying in part on decisions in *United States v. Waymon,* 510 F.2d 1020 (5th Cir. 1975) and *United States v. L'Hoste,* 609 F.2d 796 (5th Cir. 1980). these decisions are not of precedential value in considering a variance of the kind at issue here. Six defendants were charged in *Waymon* with conspiracy and mail fraud in the operation of an advance fee swindle. The evidence showed that, in addition to the joint operation conducted by all six, defendant Waymon had a side venture unconnected with his co-defendants, involving a similar scheme operated through a different company.

because of the relatively small number of defendants, and because of the comparatively insignificant variance, where the conspiracy charged was proved and the variance consisted merely of proof of an additional side venture operated by one defendant, the Court found that the variance question there was governed by *Berger v. United States,* 295 U.S. 78 (1935) rather than *Kotteakos,* which dealt with the problem of variance when a relatively large number of defendants is involved, and where the variance is significant, the proof showing many small conspiracies rather than the single conspiracy charged. Similarly, the defendants in *L'Hoste* were a corporation and three employees, including its president, who were charged with conspiring to obtain sewer construction business in Jefferson Parish, Louisiana through the payment of bribes and kickbacks to awarding authorities, The defendants contended that each separate sewer construction job was a separate conspiracy. The Court did not have to deal with the effect of variance in *L'Hoste,* for it found that the single conspiracy alleged in the indictment was in fact proved.

The panel decision on the variance issue should have been governed by *United States v. Diaz-Munoz,* 632 F.2d 130 (5th Cir. 1980), where prejeudice was found to result from a variance between the allegations and the proof. The panel distinguishes *Dias-Munoz* on the ground that there was a mis-joinder in that case, While the term "mis-joinder" is used in the opinion, it is used loosely and not in the sense of a mis-joinder under Rule 8, Fed.R.Crim.P. Insofar as the pleadings were concerned – a misjoinder under Rule 8 is an issue if pleading, not a question of evidence – the joinder of all defendants and all counts were proper. The allegations of the indictment were to the effect that the defendants conspired to commit a series of

frauds on shippers and insurance companies, and further had joined to conceal the income received from the execution of those fraudulent schemes. The Court noted that if the government's evidence had conformed to its representations to the trial court about what it expected to prove, joinder would have been proper. It was the failure of the evidence to substantiate the charge that the defendants had acted in common that rendered the joinder prejudicial. the question with which the Court actually dealt, therefore, is not one of mis-joinder under Rule 8 but one of prejudicial joinder under Rule 14, precisely the question presented here. The difference is that the joinder in this case, where 20 defendants were tried together for three months, and where the evidence showed, not a single conspiracy but 12 or more factually unrelated conspiracies involving discrete groups of persons, with no common thread but the fact that Willie Noriega set each of the fires, is far more prejudicial than was the joint trial in *Diaz-Munoz.*

Finally, the panel improperly relied on the length of the jury's deliberations, and the fact that some defendants were acquitted on some or all or the charges against them, as negating the prejudice inherent in this mass trial. The Supreme Court in *Kotteakos* rejected such a justification for upholding a conviction, five of the 12 defendants in that case having been acquitted. The Court held that it was improper to rely, it support of a finding of harmless error, on the presumptive care shown by the jury in their deliberations. The panel's quotation from Professor Moore's treatise, at page 8249 is literally accurate but somewhat misleading. Professor Moore's comment is not a statement of a rule, but a sharp criticism of a practice that presents grave risks of resting convictions on jury confusion. The statement that "the Court will look to the

verdict" to determine on appeal whether a jury was likely to be confused immediately follows this observation:

> "Occasionally a severance is granted where the indictment is so complex that it is obvious that no intelligible charge, nor intelligent verdict, can be given. But availability of relief under Rule 14 is rarely commensurate with the dangers of jury confusion."

The thrust of that section of the treatise is that courts have been too niggardly in interpreting and applying Rule 14, with the result that the danger of convicting innocent persons has been heightened. 8 Moore, Federal Practice and Procedure, 14.04[1], pp. 14-37 through 14-53.[1]

A determination that a fair trial of so many defendants, charged with so many discrete crimes, packed together in a small courtroom for so long, was humanly impossible in these circumstances, does not impugn the care and sensitivity with which the trial judge conducted the proceedings. It simply recognizes that some things are impossible, and that affording all the defendants in this case a fair trial at once was such a thing. Considerations of judicial economy are too often, and here improperly, invoked to justify a mass trial. It should be apparent from the discrete nature of the substantive offenses charged to the various defendants that an enormous amount of evidence would not have been repetitious from one trial to

[1]The following comment quoted by Professor Moore is a fair statement of his expressed view in the treatise of the efficacy of Rule 14 to prevent his prejudice, as presently applied: "We ought to be able to do better than this complacent tolerance of collective assessment of guilt. The only justification for the mass trial that Rule 14 encourages is that the cheapest, easiest way to send a large group of people is to dispatch them at the same time, the mass transportation permitted by Rule 14 explains why the expression "railroading a man to jail" has come to signify unfairness and injustice. . . . I doubt seriously that this nation cannot afford to hire enough judges and jurors to determine guilt individually".

another, and that separate trials for many defendants would in many cases have taken a day or less. If the Court wishes to be known as not encouraging mass trials, then it is time to stop mass trials from being conducted. Mere protestations that they are abhorrent to the judiciary. *United States v. Elliott,* 571 F.2d 880 (5th Cir. 1978) will not accomplish that result.

III

THE DISTRICT COURT ERRED IN DENYING MARTINO'S MOTION FOR SEVERANCE BASED ON AFFIDAVITS OF CO-DEFENDANTS DENYING HIS PATICIPATION IN TRANSACTIONS IN WHICH HE AND THEY WERE JOINTLY CHARGED AND STATING THEIR WILLINGNESS TO TESTIFY IN SEPARATE TRIALS

Martino's pre-trial motion for severance, based on the affidavits of Paul Guarino and Jimmy Farina that he did not have discussions with either of them about proposed arsons on buildings in connection with which he and they were jointly charged, is detailed in his main brief at pages 34-39. The panel opinion fails to address that issue, which is particularly compelling in view of the mass trial context. The panel opinion indicated that the scales of prejudice were in almost perfect balance on the question whether the failure to severe under the circumstances was an abuse of discretion. Had Judge Hodges been slightly less meticulous in his curative instructions and explanations, had the jury been slightly less selective in mixing its verdicts, the panel indicates that a different result would obtain. Yet one of the most compelling additional factors that might exist in any case – the availability of exculpatory testimony from a co-defendant, unavailable in a joint trial because of his plea of Fifth Amendment privilege – is not considered, either in the context of the mass trial issue or singly, Mar-

tino's argument on this issue apparently having been lost in the jumble of briefs filed on behalf of 16 appellants. Martino respectfully requests that the panel reconsider the appeal and determine the issue arising from his pre-trial motion for severance, both on its merits independently and as it relates to the question of prejudice resulting from a mass trial, and that a new trial be granted at which he will be able to produce the proffered testimony, unless, on grounds urged elsewhere, a directed judgment of acquittal be entered.

IV

THE DISTRICT COURT ERRED IN DENYING MARTINO'S MOTION FOR NEW TRIAL, BASED ON NEWLY DISCOVERED TESTIMONY OF PAUL GUARINO BASED ON HIS PARTICIPATION IN THE TRANSACTIONS, DENYING MARTINO'S KNOWLEDGE OR PARTICIPATION

The panel's disposition of this contention was affected in part by an inaccurate review of the record. The court below found that the evidence was not newly discovered whithin the meaning of Rule 33, Fed.R.Crim.P., because Martino's counsel's pre-trial efforts to persuade Guarino to testify had resulted in an affidavit giving some indication of the exculpatory testimony he could give if he consented to be a witness, even though Martino was unable to obtain the testimony or any significant detail about it at the pre-trial stages. On appeal the government shrank from defending this finding, the only ground of decision below. The District Judge specifically declined to make any finding on the issues of due diligence or materiality, or on whether a different result might obtain at another trial if Martino had the testimony available. The government argued, instead, that the testimony of Guarino should be rejected as inherently incredible. The panel, apparently

unsatisfied with either, undertakes to determine that even if Guarino testified, and his testimony were credited, a different result would not probably obtain. Martino suggests first that such an inquiry is inappropriately made in the first instance by an appellate court, where the trial court, who has heard the evidence and could best evaluate the probable result of proffered testimony, has made no finding on the question. Had the District Judge found as a fact that the testimony of Paul Guarino probably would not have produced a different result at another trial, then the abuse of discretion standard referred to in the panel opinion would be appropriate. But Judge Hodges made no such finding, and it is inappropriate for the panel to assume that he would have so found that he reached that question. The proper course would have been to remand for determination by the District Court on that issue, rather than for a panel of the appellate court to attempt to determine in a vacuum the probable effect of Guarino's testimony.

Beyond this, however, the holding is deficient in other respects. Much of Guarino's testimony is discounted, from the standpoint of its probable result, because it related to charges of which Martino was acquitted. However, the panel itself has stated that Martino's RICO convictions – by far the most serious of the offenses – may be predicated on those very charges of which he was acquitted. The conclusion that Guarino's testimony would not probably have affected the result is hopelessly at odds with its determination in the main appeal. If testimony which the jury did not give sufficient credence to base a conviction on the mail fraud counts is nevertheless assumed to have been sufficiently persuasive to find Martino associated with Noriega's enterprise, then surely Guarino's testimony, diametrically opposed to Noriega's on those

issues, must be assumed to have a probable effect on the outcome. A similar observation holds true for Guarino's testimony about the Twelfth Street warehouse fire. To the extent it is permissible to consider Noriega's testimony about that transaction as a basis for Martino's conviction on the RICO charges, Guarino's contrary testimony must be assumed to have a likely effect on the result.

Finally, the panel states that Guarino's testimony about the Columbus Drive fire, in which he admitted he was involved, but in connection with which he denied paying Martino any illegal payment, does not contradict Noriega because "Noriega did not testify about a kickback, but rather that [he and Guarino] bought out Martino's interest" (Slip Opinion at 8274). This statement derives from an account of the evidence contained at pages 18 and 19 of the government's brief, which government counsel later acknowledged in part misread the record. Noriega did use the word "interest" in describing the payment he claimed he and Guarino made to Martino. However government counsel (and apparently later the panel) mistakenly inferred from the use of that word that Martino had an interest in the property which Noriega purchased, this being the subject of the testimony. But the interest to which Noriega referred had nothing to do with an interest in the property, but with an expectation of receiving fraudulent insurance proceeds. The evidence is uncontradicted that neither Martino nor any company with which he was connected ever had any interest of any kind in the Columbus Drive property, either as owner or as mortgagee, until February 1977, after Noriega bought the property from Mrs. Williams, when Ybor Loan Co. made a $2,500 second mortgage loan to Noriega. Noriega's testimony about the claimed $2,000 payment was that Martino wanted half the insurance profits but Noriega proposed, and Martino

agreed to accept, an immediate $2,000 payment for assisting in the transaction, in lieu of receiving any of the insurance proceeds after the fire. Noriega further testified that he obtained his half of the $2,000 payment from the proceeds of the second mortgage loan. (Noriega did, to be sure, give two other versions of where he got the money during the trial). If this is not a kickback, it is difficult to understand what the term might comprehend.

Guarino's testimony, viewed other than through the jaundiced eye of a presumption of guilt. is directly exculpatory and directly contradicts Noriega. To refuse Martino the opportunity to present that testimony to a jury is a negation of due process.

V

THE DISTRICT COURT ERRED IN REFUSING A TENDERED INSTRUCTION THAT WOULD HAVE PERMITTED THE JURY TO CONSIDER THE REFUSAL OF NORIEGA AND CARTER TO ANSWER PROPER QUESTIONS ON CROSS EXAMINATION AS AFFECTING THEIR CREDIBILITY

The panel opinion addressess the request to strike the testimony of Noriega and Carter, based on their invocations of Fifth Amendment privilege on cross examination; the question whether their testimony should have been stricken is not, of itself, included within the scope of this petition. Martino acknowledged in his main brief that, except for questions directed to Noriega's reporting of acquisition expenses on his tax returns for the pertinent years, all the questions to which answer was refused on grounds of privilege related to credibility. However, the panel's analysis stops once it concludes that it was unnecessary to strike the testimony. It fails to consider the additional contention, raised at pages 47 and 52 of Mar-

tino's main brief and emphasized at page 16 of his reply brief, that the District Court refused a tendered instruction (Defense Request No. 11, quoted at n. 17, page 47, of Martino's main brief) that would authorize the jury to consider the assertion of privilege on cross examination in determining credibility. Refusal of this instruction was particularly prejudicial, in view of the fact that the jury elsewhere was instructed to draw no inference at all from an assertion of privilege, an instruction intended to apply only to a defendant's failure to testify at all, but which could only have confused the jury in considering how to evaluate the refusal of Noriega and Carter to answer relevant questions on cross examination after testifying freely on direct. This issue is not addressed by the panel, and Martino submits that the refusal of this instruction cannot be found harmless in view of the critical place that the determination of Noriega's and Carter's credibility occupied in this trial.

VI

THE TRIAL COURT ERRED IN REFUSING TO ALLOW PSYCHIATRIC EXAMINATION OF NORIEGA TO DETERMINE HIS MENTAL CONDITION AND STATE OF MIND AT THE TIME OF THE ACTS CHARGED IN THE INDICTMENT, WHERE GOVERNMENT WITNESSES ON THE ISSUE HAD ACCESS TO HIM FOR EXAMINATION

The panel opinion inaccurately states the issue raised. Defendants did not request that the Judge require the court appointed expert to make an evaluation of Noriega's mental state at the time about which he testified, though that would have been better than nothing. The request was that Court allow the expert consulted by the defendants on the issue the same access to Noriega that was enjoyed by the government's in-house expert who testified on the

same issue. It is fundamentally unfair, and not conducive to reliable results at trials, when the proponent of one point of view is allowed access to the source of relevant information which is refused to the proponent of another view. This was the issue presented. All the experts agreed that personal examination and observation of Noriega was of great importance in arriving at a reliable opinion about his mental state at any time, and particularly at the time of the events about which he testified. Yet the experts consulted by the defendants were refused any opportunity for such an examination, whereas the government's in-house expert could examine Noriega at any time he pleased. The importance of access to Noriega is highlighted by the government's closing argument, in which the fact that Drs. Afield, and Rubio had not examined Noriega was heavily relied on as a reason why the jury should disregard their opinions. Such an argument is entirely reasonable; firsthand experience with anything significantly enhances the credibility of an opinion about it. If the Court believes that, in a matter that is a proper subject for expert opinion at trial, the government should be allowed exclusive access to the most reliable source of information about it, it should say so. If the Court believes that the principle of equal access to the sources of relevant evidence is included in the concept of due process, it should reconsider this issue and remand for a new trial, at which defendants' experts will have such access.

CONCLUSION

For the reasons stated herein, and for the reasons stated in his separate petition for rehearing *en banc* filed herewith, defendant/appellant Sam C. Martino respectfully requests that the panel withdrew its opinion and reconsider the issues presented herein, setting such further

briefing or argument as may be appropriate, and after full consideration of the issues and the record, reverse the judgments below with appropriate instructions as requested in his original brief.

Respectfully submitted,

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APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 78-5260

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ROSARIO PALERMO, WILLIAM H. BROWN, a/k/a Bill, JOHN D. FISHER, ROBERT D. YOUNG, JOSEPH MACALUSO, a/k/a Joe, FRANK SCIONTI, JOHN NICHOLAS LOSTRACCO, SAM C. MARTINO, PAUL GUARINO, JIMMY FARINA, BERTON B. CHASE, a/k/a Bert, ROLANDO GONZALES RODRIGUEZ, a/k/a Roland Rodriguez, JOSEPH D. LAZZARA, a/k/a Joe, JOSEPH C. RUSSELLO, a/k/a Joe, and AMALIA MORGADO,
Defendants-Appellants

NO. 79-2606

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

SAM C. MARTINO,
Defendant-Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

ON PETITIONS FOR REHEARING
AND SUGGESTIONS FOR REHEARING EN BANC

Before TUTTLE, VANCE and POLITZ, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing filed by the appellee, the United States of America, and by various of the appellants in the above entitled and numbered causes are DENIED, and no member of this panel nor judge of this court in regular active service having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; local Fifth Circuit Rule 16), the suggestions for rehearing en banc are DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

Petitioner's Reply Brief

NO. 81-907

RECEIVED
MAR 5 1982
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

SAM C. MARTINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO STRIKE BRIEF IN OPPOSITION OF RESPONDENT

Sam C. Martino moves to strike the respondent's brief in opposition to his petition for a writ of certiorari on the ground that it materially misstates critical matters of record.

The major issues are whether isolated contacts with a criminal enterprise support RICO convictions, and whether one jury can decide the cases of twenty defendants, each charged with conducting isolated transactions with the enterprise. Respondent attempts to obscure those issues by treating en bloc the nine cases that seek review of the underlying premise of the decision below, that RICO overruled Kotteakos v. United States, 328 U.S. 752 (1946). In doing so, however, the respondent demonstrates, by its repeated misstatements of fact, that fair consideration of so many diverse cases is impossible. Even at this level of review, it cannot accurately and fairly describe the evidence in each case.

The brief twice mentions the evidence against Martino; in both instances it misstates it. At page 17 it states that "[Hiram] McElroy had been . . . the dupe of Martino and other members of the enterprise". Whatever is intended by calling McElroy a "dupe", there is no evidence connecting him with

Martino. McElroy, employed by Lazzara, was assertedly connected with a fire in Miami, Florida in 1973, before Martino met Willie Noriega. There was no evidence, even in Noriega's testimony, that Martino and McElroy were in any way connected, or even that either had heard of the other. Perhaps respondent meant to refer to Lazzara instead of Martino, and never noticed the error; perhaps counsel simply cannot distinguish among the petitioners, in either event a telling commentary on the Herculean task imposed on a jury given twenty cases to decide at once. Regardless of its origin, the reference should be stricken.

Less obvious, but more serious, are the misstatements in footnote 9 at page 14, the only other reference to the evidence against Martino. Martino's petition noted that the single wrongful act the jury found him to have committed was lending Noriega $2,500 in January 1974, knowing (according to Noriega) that he would be repaid from fraudulently obtained insurance proceeds. Martino questions whether that act constitutes a "pattern of racketeering activity" or makes him a participant in conducting the affairs of Noriega's enterprise, merely because the mails were used three times in processing Noriega's insurance claim. Respondent asserts that this Court need not consider the question because Martino was involved in many other crimes and was "guilty of far more than the two predicate acts required by statute". It cites twelve record references to show that Martino's petition is "devoid of factual basis."

Of the twelve references, five (Tr. 49/65-66, 74-75, 75, 99; 68/16) relate to a fire Noriega set at a house on Nebraska Avenue in Tampa, charged in Counts 11 - 13, as to which the evidence is discussed at page 7 of Martino's petition. Martino was acquitted of all charges relating to this fire. In his petition (pp. 23-24) he questions whether a reviewing Court may consider charges of which he was acquitted to find the "predicate acts" required for

a RICO conviction. Respondent makes no attempt to justify that practice; it attempts to conceal it by offhandedly asserting that Martino "agreed to provide financing for projected arsons" and "supplied information concerning buildings that could be inexpensively purchased and burned for profit", without disclosing that the record references it cites are to testimony rejected by the jury.

Two references (Tr. 49/102, 121) relate to the loan in Counts 14 - 16, which, as set forth in his petition, is the sole culpable act of which the jury found Martino guilty. His petition (pp. 7 - 9) fully discusses the evidence relating to those charges. He acknowledges that Noriega's uncorroborated testimony would support a finding that he expected repayment from fraudulently obtained insurance proceeds. They are not, however, additional "acts of racketeering," as the brief suggests.

Another reference (Tr. 50/220) is direct misstatement. The brief states that Martino "appraised a building so that petitioner Morgado could obtain insurance". Martino was a court-appointed appraiser for an estate in probate. There is no evidence that he knew Noriega intended to burn the property, knew that any fraudulent scheme existed, or committed any wrongful act in connection with his appraisal. The transcript reference is to Noriega's testimony about a conversation with Paul Guarino, who informed him of the building and its rundown condition (the brief elsewhere notes that it was condemned), the identity of the real estate agency handling it, and said that he "felt that they could get Mr. Martino to appraise the property at around $1,000". That hearsay statement is the only reference to Martino, in a 100 volume record, in any way relating to this property. To cite it as proof of Martino's guilt of anything is dishonest.

Another reference (Tr. 73/257-261) is to testimony that in 1974 Martino's real estate company bought a lot on which had

stood a building Noriega burned in 1973. The government did not contend at trial that Martino had any connection with this fire. There was no testimony that he ever knew that the building's destruction was the result of Noriega's activity. It was not suggested until the appeal that Martino's purchase and resale of this property, long after the fire, was in any way connected with the purposes or activities of Noriega's enterprise.

The footnote contains three references (Tr. 49/176 [twice], 181) to Noriega's testimony about the assignment to Alex Fekete of a lease on a Tampa warehouse, which Noriega burned 16 months later. The indictment alleged that Martino committed an act of racketeering, the arson, in connection with this property, but there was no evidence, in Noriega's testimony or elsewhere, that Martino in fact had any connection with the arson, or even any connection with Noriega during the 16 months between the assignment of the lease and the fire. Martino's petition discusses in full (p. 9) the evidence related to the warehouse. The jury made no finding on it. What is particularly pernicious about respondent's treatment of the record is the suggestion -- nay accusation -- that Martino has attempted to conceal from this Court matters of record from which the jury might have found him to have been a continuing member of Noriega's grisly enterprise; yet every record reference is to evidence treated in full in his petition or never claimed at trial to indicate wrongdoing by him.

Even assuming that there was evidence from which Martino could have been found to have some culpable connection with the warehouse fire, it cannot be determined that any such finding was made. This Court has long held that if a case is submitted on alternative theories, one of which is invalid, the conviction may not be upheld even if the evidence would support it on the valid theory, unless the jury returned a special verdict or it otherwise can be determined from the record that the verdict was

grounded on the valid theory. Stromberg v. California, 283 U.S. 359 (1931); Yates v. United States, 354 U.S. 298 (1967); Bachellar v. Maryland, 397 U.S. 564 (1970). Except for the loan on the Columbus Drive house, the assignment of the warehouse lease is the only other act with which the jury might conceivably have found Martino to have any criminal connection. But the jury was instructed that it need not find that a defendant committed two different wrongful acts; it need only find him guilty of any two counts of mail fraud, even if they arose from the same act, to find a "pattern of racketeering activity". If a single act is an impermissible predicate for RICO liability, Martino's RICO convictions cannot stand. Respondent's claim that his presentation of this point is "devoid of any factual basis" is a disingenuous ploy to obscure the gravity of the issue. Martino is requesting the Clerk of the Court below to certify Volumes 49, 50, 68 and 73 pursuant to Supreme Court Rule 19.1.

Because of the prejudicial effect of the misstatements of evidence relating to him, inevitably obscuring the issues presented to this Court, petitioner respectfully requests that the respondent's brief in opposition be stricken and that it be directed to file a separate brief responding to his petition, addressing the issues raised therein as it contends they should be evaluated under the evidence in his case.

Respectfully submitted,

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